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SUPREME COURT OF THE UNITED STATES

(No. 497, October Term, 1947)

OCTOBER TERM, 1948

No. 26

C. M. TINGLE, ET AL., ... *Petitioners*

v.

ANDERSON-TULLY COMPANY ..... *Respondent*

RESPONSE TO PETITION FOR WRIT OF CERTIORARI, AND OPPOSING BRIEF

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SUPREME COURT OF THE UNITED STATES

(No. 867, October Term, 1947)

OCTOBER TERM, 1948

No. 95

C. M. TINGLE, ET AL., ... *Petitioners*

v.

ANDERSON-TULLY COMPANY ..... *Respondent*

RESPONSE TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

Comes the respondent ANDERSON-TULLY COMPANY, replying to Petitioners' prayer for a Writ of Certiorari, and pleads:

A. With reference to "THE QUESTIONS PRESENTED" as stated by Petitioners (p.3):

1st. Respondent denies that Petitioners accurately state the factual finding of the Circuit Court of Appeals. Petitioners make no distinction between the physical facts as they existed in 1822 and the physical facts as they existed 116 years later when the present litigation began.

The Circuit Court of Appeals did *not* find that the area in controversy formed as accretions "on the very part of the bed of the Mississippi River to which said Court of Appeals found Petitioners possessed title". Neither Petitioners nor their predecessors in title ever owned that part of the bed of the Mississippi River *at the time the alluvion here involved was deposited thereon.* To the exact contrary, as established by the undisputed evidence, the alluvion here involved was *always* deposited on that part of the bed of the Mississippi River *then owned by Respondent* or its predecessors in title, having always been deposited between Respondent's shore line and its river thalweg boundary. The accretion area above water always proceeded from *Respondent's* ever advancing shore line as was expressly found as a fact by the District Court. See Finding 2 (R.182).

2nd. Respondent denies that Petitioners' 2d question presented is either accurate or correct for the reasons given in the preceding paragraph.

3rd. Respondent denies that Petitioners' 3d question presented is either accurate or correct for the reasons hereinbefore given. Petitioners ignore the legal fact that *both* of their *original* river thalweg boundaries were constantly shifting and changing, and that the alluvion now involved was never deposited within the calls of the Petitioners' title *at the time the accretions were formed.* Petitioners are in error in stating that the natural prolongation of the Yazoo River was ever "across (wholly within) the sphere of ownership of Petitioners". Both the physical facts and the law refute this statement.

4th. Respondent denies that the decision of the Circuit Court of Appeals violated any rule of property or

law enunciated by the Supreme Court of Mississippi. The Conclusions of Law of the District Court were erroneous, and should not be reinstated, for the reasons made crystal clear by the opinion of the Circuit Court of Appeals.

5th. Respondent denies that the opinion and order of the Circuit Court of Appeals are in conflict with the applicable Mississippi decisions and rules of property governing title possessed by Mississippi riparian owners of uplands. On the contrary, the Circuit Court of Appeals correctly applied rules of property as expressly declared by decisions of the Supreme Court of Mississippi.

B. With reference to "REASONS FOR ALLOWANCE OF WRIT OF CERTIORARI" as stated by Petitioners (p.5):

1st. Petitioners' 1st Reason is inaccurate and incorrect.

2nd. Petitioners' 2nd Reason is inaccurate and incorrect.

3rd. Petitioners' 3rd Reason is inaccurate and incorrect. The accretions here involved were never formed "*to and over*" Petitioners' lands.

4th. Petitioners' 4th Reason is not applicable here. Petitioners have in mind the rule for apportioning accretions to a single shore line between coterminous owners lying side by side along the same side of a single river.

5th. Petitioners' 5th Reason is inaccurate and incorrect, not being applicable to the physical facts here involved as is plainly pointed out in the opinion of the Circuit Court of Appeals (*Anderson-Tully Co.* v. *Tingle*, 166 F. 2d 224 (R.205-211).

WHEREFORE, Respondent respectfully prays that the Petition for a Writ of Certiorari be denied.

LAMAR WILLIAMSON,
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As *Attorney for Respondent.*

Of Counsel:

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Vicksburg, Mississippi.

(All italics in the foregoing Response, and in the following Brief, are ours.)

BRIEF FOR RESPONDENT

Because the unanimous Opinion of the Circuit Court of Appeals as written by Judge Sibley (166 F. 2d 224 - R. 205-211) so succinctly and accurately refutes every argument which Petitioners continue to advance here any further brief by the Respondent is probably entirely unnecessary. We confidently rely upon that Opinion. The remainder of this Brief will merely amplify and support the decision appealed from repeating much of the brief filed below which presented the authorities that guided the Circuit Court of Appeals to its decision so indubitably correct.

STATEMENT OF THE CASE

No Federal question is here involved.

At page 9 of their brief, Petitioners frankly confess: "No consequential dispute exists as to the facts." The District Court also correctly declared: "there is little dispute as to the actual facts in the cast" (R.176). The only issue is as to the *law* applicable to the indisputable physical facts.

The District Court correctly found as an undisputed fact:

> "Since 1822 the area in controversy has been formed by the gradual and imperceptible addition of alluvion *as accretion to said original Section* 2, Choctaw District, *now owned by the defendant Anderson-Tully Company*, said accretion progressing gradually downstream to its terminating point at the present time." (R.182, Finding of Fact No. 2).

The trouble with Petitioners' "Statement of the Case", and their entire argument, is that they refuse to face both (1) the undisputed historical physical *facts* as found in the record, and (2) the well settled law of accretion applicable in all common law states, including Mississippi. The Circuit Court of Appeals corrected these errors of the District Court in which Petitioners persist.

1. Petitioners base their entire argument upon the physical facts, and the title of their predecessors, as they existed in 1822, ignoring the legal and physical fact that their transitory riparian boundaries of 1922 have constantly changed, shifted and varied for 116 years since that time. Petitioners ignore the physical fact that throughout the years involved the river thalweg boundaries of both the Respondent and the Petitioners were constantly shifting and moving, and the *beds* of *both* rivers were constantly changing. The alluvion here involved was always deposited on a *new* bed of the river then owned by Respondent's predecessors in title because it was the half of the bed of the river lying between Respondent's shore line and Respondent's outer thalweg boundary. No accretion here involved ever passed laterally any "*fixed*" boundary line of any laterally coterminous neighbor as Petitioners so vigorously but fallaciously argue.

The Yazoo River never prolonged itself "*across* and *within*" Petitioners' lands as they so repeatedly but erroneously argue. The Yazoo River was never "an internal" stream so far as Petitioners lands were concerned, but rather has always been an *outside boundary* stream.

The Circuit Court of Appeals rightly corrected these errors and adjudicated the title to the land and boundaries as they existed when the present litigation commenced.

2. Petitioners *deny to Respondent* all of Respondent's riparian and accretion rights to *its* Mississippi River and Yazoo River boundaries, which rights Petitioners so vigorously argue for themselves, citing appropriate authority therefor.

Petitioners erroneously ignore the entire ancient body of the *laws of accretion,* erroneously declaring: "It is *not* the technical law of accretions * * * that here governed" (p.22). In oral argument before the Circuit Court of Appeals Petitioners admitted that under the general law of accretions the title to the area in controversy is indeed vested in Respondent; but they argued that Mississippi, although a common law state and with no statutory provisions to the contrary, does not acknowledge the laws of accretion, and instead has an *exceptional* rule of riparian property of its own. This is indeed a novel idea which the Circuit Court of Appeals properly rejected.

3. *The Physical Facts.* Finding of Fact No. 2 by the District Court correctly states the ultimate controlling historical physical fact of this case.

This established physical fact is quickly seen by an examination and comparison of Respondent's (Defendant's) Exhibits 1, 2 and 3.

Respondent's Exhibit 1 shows the location of the Mississippi River and the Yazoo River *as of* 1822, when the original Government *land* survey was made of Section 2, Township 16 North, Range 2 East, Choctaw District, the South half of which Section then formed a triangle, or V shaped point, of land pointing Southwardly down stream lying in the fork at the confluence of said two

rivers at that time, bounded on the Southwest by the Mississippi River and on the Southeast by the Yazoo River which then flowed in an old abandoned channel of the Mississippi River sometimes called "Old River".

This Section 2 lying between the two rivers immediately North of their confluence in tinted pink on Respondent's Exhibit 1, and in other maps, and is marked "*Anderson-Tully Company*". It was stipulated that Respondent Anderson-Tully Company now owns this land, and other land extending Northward therefrom as shown on Respondent's Exhibit 3 (R.26-27).

Respondent's Exhibit 1 also shows tinted in green the original land owned by Petitioners' predecessors in title as of 1830 when it was first surveyed. It was stipulated that Petitioners (Plaintiffs below) now own this land described as Section 1 (except Lot 1), Section 2, and Lots 1, 2 and 3 in Section 3, Township 16 North, Range 2 East, District West of Pearl River, and other land East thereof (R.25-27).

The lower court expressly so found (Findings 2 and 5 - R.182-183).

Respondent's Exhibit 2. After 1822 this peninsula at the confluence of the Mississippi and Yazoo Rivers progressed by accretions Southwardly, in crescent shape to the Southeastward, until when this litigation began it had extended below all of the original land owned by Petitioners' predecessors in title as is shown on Respondent's Exhibit 2. The area in controversy as described by Petitioners in their original declaration filed in the State Court November 8, 1938 (R.2-5), and more particularly described by metes and bounds in the Bill of Particulars

filed by Petitioners in the District Court below on December 7, 1944 (R.11-13), is tinted in salmon on Respondent's Exhibit 2.

Respondent's Exhibit 3. The same accretion area is shown on Respondent's Exhibit 3 cross hatched with pink and green lines. The pink lines indicate all of the accretion land claimed by Respondent as a part of its original Section 2, and all of the green lines indicate all accretion lands now claimed by Petitioners. But since Respondent has never claimed any land East of the Yazoo River, the cross hatching of the area in controversy is limited on Respondent's Exhibit 3 to all of the accretions to Respondent's original Section 2 which lie West of the now abandoned channel of the Yazoo River.

The diagonal line running from the center of the now abandoned channel of the Yazoo River near the Southern tip of Respondent's original Section 2 Southwestwardly at right angles to the Mississippi River as it existed when this litigation began (said line running from the point mentioned "South 68 degree 42 minutes West 126.5 chains to the East bank of the Mississippi River as shown by the Surveys in the year 1937" - R.12) marks the Northerly boundary of the accretion area claimed by Petitioners in their Bill of Particulars filed December 7, 1944 (R.12). This diagonal line was fixed by Petitioners' surveyor R. F. Corneil (R.168-175) and was taken from Petitioners' (Plaintiffs') Exhibit "I". (The Exhibit is referred to as "I" at R.171 and as "H" at R. 173).

That part of the area in controversy which is tinted in orange on Respondent's Exhibit 3 is the area on which Petitioners allege a trespass in the cutting of timber by

Respondent, "and to which Plaintiffs' claim is strictly confined", as described in Petitioners' Amendment to their Bill of Particulars (R.19 and 20).

However, by a Counter Claim, Respondent put in issue, as *the area in controversy* all of the accretions to its original Section 2 shown by the pink and green cross hatching on Respondent's Exhibit 3, being all of the accretion area lying West of the thread of the channel of the Yazoo River and South of the diagonal line shown on Petitioners' Exhibit "I" (and Respondent's Exhibit 3) as being the Northern boundary of their claim.

The District Court found as a fact that the *area in controversy* is correctly described and shown on Respondent's Exhibit 3 (R.185).

Respondent submits that the correct Finding of Fact No. 2 by the District Court (R.182) *as a matter of law* vests title to the area in controversy in respondent Anderson-Tully Company.

We briefly summarize the uncontradicted and controlling evidence upon which the District Court based its Finding of Fact No. 2 (A.182) as follows:

A. MR. ST. GEORGE RICHARDSON, after his unimpeachable review of all available official maps and physical facts testified:

> "In conclusion, these are the salient facts here involved. *"All the lands in controversy are definitely accretions.* • • • My analysis shows conclusively that accretions to the Tingle (Petitioners) lands *must stop at the thread of old Yazoo River.* Likewise, my analysis shows that accretions to Section 2 in Township 16 North, Range 2 East, Choctaw

> District, lying *west of the thread* of old Yazoo River *must be part of the Anderson-Tully lands.* This is the very simple answer to the whole problem" (R.61-62).

The Circuit Court of Appeals for the Eighth Circuit has emphasized the importance and weight to be given to the evidence of Mr. St. George Richardson in the following language:

> "The surveyor in charge of the party was *Mr. St. George Richardson, a thoroughly qualified civil engineer of forty years' experience,* frequently called upon to settle the vexing questions caused by the action of the Mississippi River. Mr. Richardson availed himself of all the means recognized as helpful or relevant to the performance of his task. He set forth his determinations in the form of a *written report* and also testified in great detail as to his studies, surveys and observations on the ground."
>
> *Chicago Mill & Lumber Co.* v. *Tully* (C.C.A. 8th), 130 F. 2d 268, at 273.

The Mississippi Supreme Court concurs in the emphasis placed by the Federal courts on this type of evidence, and has also expressly recognized the unquestionable qualifications of Mr. St. George Richardson, in the case of *U. S. Gypsum Co.* v. *Reynolds,* 196 Miss. 644, 18 So. 2d 488.)

B. MAJOR AUSTIN B. SMITH, who has the direct responsibility for maintaining more miles of navigation than any other person in the United States (R.92), testified that this stretch of the River has been under constant study by the Mississippi River Commission and himself since 1932 (R.92). After explaining in detal the significance

of his maps (Exhibits 23 to 31, inclusive), Major Smith concluded:

> "From my study of the maps and the area, it is my opinion that *it would have been physically impossible for the Tingle land on the East of the Yazoo River to have accreted across the channel of the Yazoo*" (R.98).
>
> "*It is further my opinion, after studying the situation, that the lands outlined in yellow* (on his maps) *lying East of the Mississippi and West of the Yazoo River* (the area in controversy) are accretions to the lands owned *by Anderson-Tully Company*" (R.98).

C. GENERAL MAX C. TYLER, immediate past-President of the Mississippi River Commission, with vast professional experience (R.104-107), testified:

> "Between the 1799 cut-off and the original government survey that material was being deposited along the south end of the original lands of Anderson-Tully Company.
>
> "At this time there was no levee system in the area, and whenever the Mississippi River reached flood stage, it left its bank and covered the entire upper end of the Mississippi Delta. As it subsided much of the water of the Mississippi River then found its outlet through the banks of the Yazoo making this river a considerable stream.
>
> "As the two streams (Mississippi and Yazoo) came together this presented *a typical case of a tributary coming into a larger stream.* The larger stream carrying the larger amount of material constantly pushed the little stream over. It is just like a big horse riding against a little horse. The big horse can shove the little horse over as he comes

ahead. Thus, as material carried by the Mississippi River attempted to deposit itself against the bank of the old Mississippi River, they were met by the waters of the Yazoo River carrying similar deposits, with the result that the accretion was put to the eastward *in a crescent shape*" (R.107-109).

"In my opinion the land was built in the following manner: Sections 35, 36, 1 and 2, Choctaw District (Respondent's original land) is land which was in place prior to the 1799 cut-off. *From that time on there was a progressive building downstream between the Mississippi River on the West and the Yazoo River on the East of a large point (the area in controversy) which hung on to the vast land area above.* This accretion point has continually grown southward. *All of the land lying between the Yazoo River and the Mississippi River was built as* ACCRETIONS TO ANDERSON-TULLY COMPANY *land and was always separated from the lands East of the Yazoo by the Yazoo River Channel*" (R.109).

D. CAPTAIN A. D. HAYNES, 67 years of age, a licensed steamboat Captain, testified:

"I have been familiar with the land formation known as Brown's Point (the area in controversy) approximately 50 years" (R.115).

"I have put timber into the Yazoo River through its mouth as it emptied into the Mississippi River from 1900 up until 1912" (R.115).

"During the time I was familiar with Brown's Point *the peninsula was continually growing southerly and easterly moving downstream, and as this peninsula moved southerly the mouth of the Yazoo River was shifting over toward the southeast*" (R. 115).

E. W. R. HOUSER, an experienced, practical surveyor and a professional Forester, employed by Respondent, worked with Mr. St. George Richardson in surveying the area in controversy (R.122), testified:

> "From a study of the *timber growth* on Brown's Point (the area in controversy), together with a study of the location of the *ridges and depressions*, it is my opinion that *the lands in controversy were formed as accretion to the lands of Anderson-Tully Company between the two rivers, the Yazoo and Mississippi, having been deposited by the Mississippi River.* These deposits were all accretions to the original mainland of Section 2, Choctaw District, and its bordering sections. The accretion land lying east of the Yazoo River, and marked 'accretion' on Exhibit 3, was formed as accretions to (Petitioners' land). These accretions were built in a westerly direction from the old Yazoo River bank *and stopped at the Yazoo River.* The timber on the land west of the Yazoo River is much older timber and there is more of a climax stand over that part of the area; while the timber on the east is younger and has not yet reached the climax stand which we found on the west side. The area east of the Yazoo River is much lower in elevation than that on the west of the Yazoo" (R.121-123).

> "It was my job to check on the possession of all of the Company's land periodically and during the nine years during which I have been employed by Anderson-Tully Company I have never heard of anyone other than Anderson-Tully Company making any claim of title to Brown's Point, or the lands in controversy. On the contrary, *Anderson-Tully Company has always claimed ownership of the area in controversy*" (R.123).

F. B. C. TULLY, President of Respondent, testified that in 1923 Respondent bought "all of the land West of the Yazoo River over to the Mississippi River", being the same area indicated as "BROWN'S POINT" on Exhibit "A" to Petitioners' original Complaint (R.128). After testifying to the repeated cutting of timber from the area in controversy by respondent Company and its vendor since 1913, Mr. Tully added that after the Company's purchase of the land in 1923: "From 1923 until 1938 when this suit was filed the Company had no notice of any other persons other than it asserting any sort of claim to any area west of the Yazoo River" (R.128).

G. Because of this uncontradicted and unimpeachable testimony the DISTRICT COURT correctly declared in its Opinion:

> "It is shown by the maps and testimony of the experts that *the accretions that are in controversy undoubtedly began to build* ON TO THE LANDS OF ANDERSON-TULLY COMPANY *in Section Two lying between the Mississippi River on the West and the Yazoo River on the east, and these accretions continued to build gradually down stream until the present area in controversy had been formed*" (R. 176).

And furthermore:

> "The evidence shows that since 1822 the area here in controversy has been formed by the gradual and imperceptible addition of alluvion *as accretions to the original Section Two,* Choctaw District, which section is now owned by (Respondent) Anderson-Tully Company; *and that these accretions gradually progressed down-stream to its present terminating point*" (R.179-180).

4. THE LAW. The Circuit Court of Appeals applied to the foregoing physical facts the following well settled law.

A. *State Law. Riparian Rights and Titles in Mississippi.* There should be no confusion on this point. From the very beginning in this case it has been conceded by *all* that in Mississippi the riparian owner takes title "to the middle of the stream".

> "By the Common Law the owners of the soil on the banks of fresh water rivers, *whatever their magnitude,* have the exclusive proprietary right therein *to the middle of the stream,* subject only to a right of passage thereon as a highway, where the stream admits it."
>
> *Morgan* v. *Reading,* (1844), 6 Miss. 367, 3 Smedes & M. 366.
>
> *Com'rs, Homochitto River* v. *Withers,* (1885), 29 Miss. 21, 33; 64 Am. Dec. 126.
>
> *Steamboat Magnolia* v. *Marshall,* (1860), 39 Miss. 109, 116, 135, 136.

The Circuit Court of Appeals, Fifth Circuit, long ago declared:

> "It appears to be the *settled law of Mississippi* that the owner of land bounded by the Mississippi River *takes title to the middle thread of the river* (Mississippi cases cited)."
>
> *Cox* v. *Phillips,* 227 Fed. 414.

BUT, even in Mississippi this "middle of the stream" now definitely means to the *deep thread of navigation,* commonly and properly called the *thalweg. Hill City Compress Co.* v. *West Kentucky Coal Co.,* 155 Miss. 55, 122 So. 747; *Wineman* v. *Withers,* 143 Miss. 537, 108 So. 708; *Cox* v. *Phillips* (C.C.A. 5th), 277 F. 414; *Hogue* v. *Stricker Land & Timber Co.* (C.C.A. 5th), 69 F. 2d 167, 70 F. 2d 722-723.

While the early Mississippi decisions were based upon a holding that the Mississippi River was not *technically* a navigable stream, even the Mississippi courts take judicial knowledge of the fact that the river is "*navigable in fact*". In *Hill City Compress Co.* v. *West Kentucky Coal Co., supra,* the Mississippi Court adopts the Illinois rule which so declares in the case of *Buttenuth* v. *Bridge Co.,* 123 Ill. 535, 17 N.E. 439, 5 Am. St. Rep. 545, which holds:

> "The 'channel' is the bed of a stream, especially the *deeper* part of a river * * * where the main current flows. It indicates the line of the *deep water which vessels follow.*" (Headnote, and 5 Am. St. Rep. at pp. 553-554).

> "Courts take judicial notice of the navigability of streams constituting great national highways of commerce, as well as the navigability or non-navigability of smaller streams within the jurisdiction."
>
> 31 *Corpus Juris Secundum,* p. 579, Sec. 33.
>
> 20 *American Jurisprudence* 79, Sec. 56.

The lower court recognized this established principle in Mississippi, citing the case of *Harrison* v. *Reading,* 3 *Smedes & Marshall* 366, *Steamboat Magnolia* v. *Marshall,* 39 Miss. 109, and *Wineman* v. *Withers,* 143 Miss. 537, 108 So. 708 (R.177). The lower court could also have cited *Iselin* v. *La Coste,* 139 F. 2d 887, where the Circuit Court of Appeals, Fifth Circuit, again declared:

> "Under Mississippi law, a riparian proprietor on Mississippi River holds to *the thread of the stream.*"

B. *Federal Law* — accepted by Mississippi. BUT where *a boundary line between two states* is involved, Federal courts do *not* follow State court decisions. Only the

Supreme Court of the United States has jurisdiction as the final arbiter to settle State boundaries.

Nebraska v. *Iowa*, 143 U.S. 359, 36 L. ed. 186.

Iowa v. *Illinois*, 147 U.S. 1, 13 S. Ct. 239, 37 L. ed. 55.

Whitaker v. *McBride*, 197 U.S. 510, 25 S. Ct. 530, 49 L. ed. 857.

Louisiana v. *Mississippi*, 202 U.S. 1, 49, 26 S. Ct. 408, 50 L. ed. 913.

Arkansas v. *Tennessee*, 246 U.S. 158, 38 S. Ct. 301, 62 L. ed. 638 (modifying *State* v. *Muncie Pulp Co.*, 119 Tenn. 47, 104 S.W. 437); and 247 U.S. 461, 38 S. Ct. 557, 62 L. ed. 1213.

Arkansas v. *Tennessee*, 310 U.S. 563, 60 S. Ct. 1026, 84 L. ed. 1362.

Arkansas v. *Mississippi*. 250 U.S. 39, 39 S. Ct. 422, 63 L. ed. 832.

Kansas v. *Missouri*, 322 U.S. 213, 64 S. Ct. 975, 88 L. ed. 1234.

Smith v. *Leavenworth*, 101 Miss. 238, 57 So. 803.

Hill City Compress Co. v. *West Kentucky Coal Co.*, 155 Miss. 55, 122 So. 747.

Sharp v. *Learned*, 195 Miss. 201, 14 So. (2d) 218.

U. S. Gypsum Co. v. *Reynolds*, 196 Miss. 644, 18 Co. (2d) 448.

Hogue v. *Stricker Land & Timber Co.*, (C.C.A. 5th), 69 F. (2d) 167 and 70 F. (2d) 722.

Iselin v. *La Coste*, (C.C.A. 5th), 139 F. (2d) 887.

When each of the foregoing decisions has been carefully studied the Court will have a fresh, clear and complete recollection of all the laws of ACCRETION and AVULSION to be applied to the physical facts in the case at bar.

POINT I

THE CONSTANTLY SHIFTING, CHANGING AND VARYING RIVER BOUNDARIES

The reversed decision of the District Court cannot properly be reinstated because it totally ignored the physical fact that the *two* boundary rivers (the Mississippi and the Yazoo) have been constantly changing their courses and beds throughout all the years here involved. This is the decisive point in this litigation.

The basic error in the District Court was in basing its decision of legal ownership in 1939 on the physical facts as they existed in 1822, 116 years before this suit was filed. The District Court erred in holding as a matter of law that the riparian boundaries of the parties were *forever "fixed"* by the meander lines of those river boundaries as they existed momentarily when the original Government land survey was made in 1822. Contrary to the principles of *accretion law* in every jurisdiction with which we are familiar, including Mississippi, the District Court erred in ignoring the *law* that the river boundaries of the respective parties constantly shifted and changed as the *two* boundary rivers themselves shifted and changed.

Notwithstanding the meandered shore line of Petitioners' lands in 1830 as shown on Respondent's Exhibits 1, 2, and 3, Petitioners' witness Corneil and the District Court assumed that accretions thereto had 8 years earlier reached the bank line of the Yazoo River as meandered in 1937 on Exhibit "A" to Petitioners' Complaint. This 1937 bank line of the left or East bank of the Yazoo River, adopted by Petitioners in their original pleadings, is shown as the East boundary of the area in contro-

versy on Respondent's Exhibit 2. There is not a scintilla of evidence to support the assumption that this accretion to Petitioners' land East of the Yazoo River had reached that line, or any other particular line, in 1822. Nevertheless Mr. Corneil on his map Exhibit "I" proceeded from that *bank line* North of West to the 1937 thread of the former Yazoo River for his real point of beginning as shown on Respondent's Exhibits 2 and 3. This point was assumed to be in 1822 immediately East of the South *bank line* tip of Respondent's Section 2 West of the Yazoo River. From this assumed 1822 point, in 1938 witness Corneil drew his diagonal line running South 68 degree 42 minutes West to the 1937 bank of the Mississippi River (R.171) as shown on Respondent's Exhibits 2 and 3.

This astonishing jump of 116 years, *ignoring all of the intervening changes in the Yazoo River for more than a century,* was strangely enough adopted by the District Court as the basis of its judgment (R.190). This was that Court's basic error which was corrected by the Circuit Court of Appeals.

In its opinion the District Court stated:

> "The point at which the mouth of the Yazoo River and the *thread* of the stream of the Mississippi River came together will determine the legal question as to the title of the accretions that are involved in this controversy" (T.176).

That statement of the law was correct if the Court had applied it to the physical conditions as they existed when this suit was filed in 1938, and as those conditions are found on Respondent's Exhibit No. 3 which is admitted to be correct. But the District Court erroneously applied that correct declaration of law to the physical facts *as they existed in* 1822 (R.176).

The District Court repeatedly emphasized this legal anachronism as follows:

> "Plaintiffs' (Petitioners' here) lands at the time of the government Survey *in* 1822 *were riparian to the Mississippi River,* and (their) predecessors in title to (their) land owned to the thread of the stream, and it is, therefore, necessary to determine from all the evidence *where the thalweg of the Mississippi River and Yazoo River met* ON THAT DATE" (R.179).

The Court then proceeds to discuss in great detail the physical facts as they existed in 1822 (R.179-180).

We confidently submit that it is entirely immaterial where the thalwegs of the two rivers met *"on that date"*, as will be hereinafter established by unimpeachable authorities.

This basic error was carried into the District Court's Findings of Fact as follows:

> "5. These sections (Petitioner's original land East of the abandoned thread of the Yazoo River), all lying in Warren County, Mississippi, were at the time of the General Land Office Surveys about the year of 1822, *and are now,* fractional sections riparian, in whole or in part, to the Mississippi River as hereinafter set forth" (R.183).
>
> "6. At the time of the surveys by the General Land Office (1882), the Yazoo or Old River, at its mouth, separated the (Petitioners') holdings in the extreme Southern portion of Section 1 thereof from (Respondent's) holdings in Section 2 thereof. The litigants, through their respective predecessors in title, then owned to the center or thalweg of the Yazoo River until this river met the east *bank line* extended of the Mississippi River. Thereafter, the

record ownership, as FIXED by the General Land Office Surveys, was opposite and consequently riparian to the Mississippi River; and the respective litigants joined in ownership, from the point of such intersection, and became and were coterminous owners of lands on the Mississippi River. *The line of division between them necessarily* AT ALL TIMES *was a straight line from such point where the center or thalweg of the Yazoo* River met and intersected the east *bank line* extended of the Mississippi River (in 1822), laterally, at right angles, westerly to the thalweg of the Mississippi River, i.e., the boundary line between the States of Louisiana and Mississippi. The (Petitioners) and their predecessors were vested with title to all property and rights south and east of this division line, and the (Respondent) and its predecessors were vested with all title and rights north of said division line" (R.183-184).

This Finding ignores the indisputable physical fact that the intersection of the thalwegs of the Yazoo River and Mississippi River far South of Respondent's original Section 2 in 1822 never remained at that point for a single year thereafter. In fact this juncture of the thalwegs of the two rivers was doubtless shifted and changed after each and every successive high water stage of the rivers for more than 100 years after 1822, a fact of which this Court will take judicial knowledge. 20 *American Jurisprudence,* 79, Sec. 56; 31 *Corpus Juris Secundum* 577, Sec. 33 "a" and "b", and cases there cited. The uncontradicted evidence in this case is that this intersection did actually consistently and constantly progress down stream until the waters of the Yazoo River ceased to flow following the 1903 Diversion Canal.

In Finding No. 9 the District Court repeated that this division line was forever "*fixed* by the applicable Government Land Surveys" (*in* 1822) as "*fixed* by Mr. Corneil" (R.185).

This error of law was carried into the District Court's Conclusions Nos. 3, 4, 5, 6, and 9, each of these Conclusions being based on the physical facts as they existed in 1822 (R.186-187).

And of course this basic error was embodied in the Final Order (R.189, 190), which was reversed and corrected by the Circuit Court of Appeals.

The entire correct testimony of Mr. St. George Richardson is exactly to the contrary. With him agrees every other witness who testified on this point except Petitioners' lone railroad and highway surveyor, Corneil, who doesn't even claim to be an expert potamologist (R.169).

No judicial premise could be more erroneous, but on that erroneous premise along hangs the Petitioners' claim of title.

The original government General Land Office survey in 1822 *did* NOT forever fix the riparian boundaries, or boundary rights, of the parties. On the contrary, those boundaries, and the rights of the respective parties dependent thereon, have never been constant for a single month since 1822, but have been "as VARYING and as VARIABLE" as the wandering Mississippi River itself, which forever "writhes like an imprisoned snake thorughout its alluvial valley in futile effort to establish equilibrium". *Chicago Mill & Lumber Co.* v. *Tully,* (C.C.A. 8th), 130 F. (2d) 268, at 274.

Because Respondent's title is dependent upon, and is established by, this principle of law, and *because it was the source of the trial court's basic error,* for emphasis we probably belabor this point at greater length than is necessary.

Remembering that at the time of the original government survey in 1822 the Southwest boundary of respondent Anderson-Tully Company's Section 2 was the *thalweg* of the Mississippi River and its Eastern boundary was the *middle of the channel* of the Yazoo River as it then ran (Exhibit 1), and that its *southermost point* was *the intersection of these two thalwegs* (*Hogue* v. *Stricker Land & Timber Co.,* (C.C.A. 5th), 69 F. 2d 167, and 70 F. 2d 722, at 723), we ask this Court to visualize the *gradual and imperceptible growth* Southward by accretion of Respondent's original land from 1822 until the present time, and consider *at any particular time* exactly what had happened to the location of the thalwegs of the two rivers (Mississippi and Yazoo) *and to their point of intersection.* If, with the assistance of artists, a slow moving picture of the area in controversy could have been shown to the trial court from 1822 to date, depicting the movement of the thalwegs of the two rivers from month to month, then the court could have actually seen and followed the progress of the two rivers involved from their condition and location in 1822 until the present time, which progress progressively changed from year to year the common division boundary line between the two properties here involved, viz., the changing growing thalweg of the Yazoo River.

As original Section 2, now owned by Respondent, by accretion gradually and imperceptibly progressed Westward, Southerly, and Southeasterly, the Court would have seen the original Southwestern boundary of that section,

the thalweg of the Mississippi River, gradually move Southwestward *ahead of the growing accretion* until the river reached its present condition bounding the entire Western side of the area in controversy. It would probably be more accurate to say that as the Mississippi River eroded into the Louisiana shore, and its right bank thereby advanced in a Southwesterly direction, retreating from Respondent's Section 2, the *thalweg* of the river also moved Southwesterly, *keeping in the deepest part of the channel* near the Louisiana concave shore, thus causing the water of the left bank washing the shores of Respondent's Section 2 to also *retreat* in front of the growing accretions to Section 2. This gradual erosion into Louisiana formed the present bend of the river West of the area in controversy, very easily and clearly observed on Respondent's Exhibit 19, the Quadrangle Map.

During this same period of time the slow moving picture would show the extended Yazoo River, the thalweg of which was the Eastern boundary of Respondent's Section 2, gradually becoming smaller and smaller after 1903. After the Diversion Canal was cut about 1903 and it became the main channel of the Yazoo, of course the abandoned channel of the Yazoo eventually shrank to a mere *thread* of the former stream. Compare Respondent's Exhibits 9, 13, 18, and 21 (or 3), being Richardson's Composite Map with the rivers colored in blue as of 1822, 1881, 1914, 1940, respectively.

Of course as the Yazoo River was gradually drying up, its waters receding Eastward from the East shore line of Respondent's Section 2, a small band of land was there added by reliction to Respondent's Section 2 riparian originally to the Yazoo River. Likewise, and for the same reason, Petitioners' accretions *East* of the Yazoo River

were added to their original lands as is shown on Respondent's Exhibit 3.

But, *most important of all,* if the Court will visualize the formation of the area in controversy from 1822 to date, the Court will see that *as the accretions were formed* gradually and imperceptibly to and against Respondent's Section 2, and those accretions began to move Southward in the form of a peninsula *between the two rivers,* (Respondent's Exhibits 11-A and 11-B and 13 show how far Southward this peninsula had built by 1880), *the intersection of the thalwegs* of the Mississippi and Yazoo Rivers (the Southern boundary *point* of Respondent's land) also *necessarily moved Southward* AHEAD *of the point of the accretion peninsula.* This process has continued until the peninsula's point has now moved downstream *entirely beyond* the shore line of Petitioners' land (see Exhibits 3 and 21).

It was just as impossible for the accretion peninsula (the area in controversy) to overtake or cross this intersection of the thalwegs of the two rivers as it would be for a man to overtake his shadow when walking with the sun behind his back.

Throughout all the years involved, the uncontradicted evidence shows conclusively, *the junction of these two streams moved steadily southward and southeastward.* Just as *a wedge when driven into the log* of a tree will split the tree throughout its length, throwing one-half to one side and one-half to the other, just so the land wedge created by the confluence of these two streams (Respondent's Section 2) *continued to part and separate the two rivers as it moved down stream between them.* As this wedge was driven down stream the area in controversy as land was deposited by the process of accretion *to the shore line of Respondent's land,* and became legally *a part of it* under the same description.

During this course of events there is one inescapable fact that remained constant throughout the process and that was that *at all times* there was a conjunction or confluence of the flowing Yazoo and the Mississippi rivers until after the Yazoo Divergence Canal was built by the Government in 1903. *By that time the entire area in controversy had become formed* and had become land in place upon which vegetable and timber of large size and mature age had grown.

If, therefore, *as a matter of law,* the boundaries (West, South and East) of Respondent's Section 2 have *always* been the roving *thalweg* of the Mississippi River on the West and the Southwardly progressing *middle* or *thread* of the Yazoo River on the East, with the Southermost point of Respondent's Section 2 at the intersection of these *two thalwegs,* then it necessarily follows that respondent Anderson-Tully Company owns the entire area in controversy *as a part of its original Section* 2, Township 16 North, Range 2 East, as is shown on Exhibit 3.

Furthermore, it is obvious from the foregoing that Petitioners are in error when they repeatedly assert in their brief that *"the Yazoo River, in its prolongation, crossed through Petitioners' lands, wholly within the boundaries owned by Petitioners"*. On the contrary, as the thalweg of the Yazoo River extended itself Southward, thereby also moving Southward its intersection with the thalweg of the Mississippi River, this progressively shifted the river boundary of Petitioner's land at the same time to the same place.

This is undoubtedly the law in Mississippi as well as in every other common law state in America.

THE LAW

We find an excellent statement of the general principle of this Point in a leading Arkansas case, as follows:

> "The water boundaries of land on running streams, WHATEVER THEY MAY BE IN THE BEGINNING, whether *the thread of the stream,* the water's edge, ordinarily high or low water mark, *always remain the same* WHEN THEY CHANGE GRADUALLY, as by the process of accretion or attrition. They *gradually* SHIFT as the water recedes or encroaches; *and the area of the riparian owner's possession varies as they change by this* process. Whatever constituted them at first still constitutes them so long as it remains permanent or *shifts gradually and imperceptibly.* Hence, land formed by alluvion, or the gradual and imperceptible accretion from the water, and land gained by reliction, or the gradual and imperceptible recession of the water, *belongs to the owner of the* CONTIGUOUS *land to which the addition is made.* This rule has been vindicated by some one on the principle 'that he who sustains the burden of losses and of repairs, imposed by the *contiguity of water,* ought to receive whatever benefits they may bring by *accretion.* By others it is derived from the principle of public policy that it is the interest of the community that all land should have an owner and most convenient that insensible additions to the SHORE should follow the title to *the shore* itself.' *New Orleans* v. *United States,* 10 Pet. 662, 717; *Jefferis* v. *East Omaha Land Co.,* 134 U.S. 178; *Nebraska* v. *Iowa,* 143 U.S. 359; *Gould on Waters,* sec. 155; 2 Blackstone, 262."
>
> *Wallace* v. *Driver* 61 Ark. 429, at p 431, et seq.; 33 S.W. 641.

"What has been said of accretions is equally true of the loss suffered from the gradual encroach-

ments of running streams. *As their beds change* imperceptibly by the gradual washing away of the banks, *the* BOUNDARY LINES *of contiguous lands change with them; and the owner, having, in the beginning, acquired* NO FIXED FREEHOLD *in them,* but one that *shifted* with the changes, *is limited and confined, in the extent of his rights and possession, by the* NEW BOUNDARIES. *St. Louis* v. *Rutz,* 138 U.S. 226, 245; *Camden & Atlantic Land Co.* v. *Lippincott,* 45 N.J.L. 405; *Welles* v. *Bailey,* 55 *Conn.* 202; *Steele Sanchez,* 72 Iowa 65; *Niehaus* v. *Shepherd,* 26 Ohio St. 40; *Wilson* v. *Shiveley,* 11 Oregon, 215; *Dunlap* v. *Stetson,* 4 Mason, 349; *In re Hull & Selby Ry.,* 5 M. & W. 327; *Scratton* v. *Brown,* 4 B. & C. 495, 10 E. C. L. 670; *Foster* v. *Wright,* L.R. 4 C.P.D. 438; *Gould on Water* (2 ed.) sec. 155."

Wallace v. *Driver,* 61 Ark. 429, at p. 432, et seq.; 33 S.W. 641.

Like Mississippi, Arkansas is also a common law state. No statutes of either state has modified the common law are here involved.

Mississippi recognizes, and enforces, the principle of law now being urged, as follows:

"It is the established rule that a riparian proprietor of *land bounded by a stream,* the banks of which are changed by the gradual and imperceptible process of accretion or erosion, *continues to hold to the stream as his boundary;* if his land is increased, he is not accountable for the gain, and if it is diminished, he has no recourse for the loss. *But* where a stream suddenly and perceptibly abandons its own channel the title is not affected, and the boundary remains at the former line. *Philadelphia Co.* v. *Stimson,* 223 U.S 605, 624, 32 S. Ct. 340, 364, 56 L. ed. 570, at 578."

"The rules stated are *equally applicable whether the question of boundary is one between private proprietors or between two states,* the common boundary of which is a river. *If the center of the channel is the boundary, however much its location may vary as the result of gradual and imperceptible accretion and erosion,* IT REMAINS THE BOUNDARY."

A. G. Wineman & Son v. *Reeves,* (from Tunica County, Mississippi) 245 Fed. 254, 258.

"*The center or thread of the stream* in either event *continues to be his water boundary,* and he continues to own all of the land, either above or under the water, that lies between *that boundary* and the opposite upland boundary established by the calls of his deed."

Wineman v. *Withers,* 143 Miss. 537, 108 So. 708 (R.178).

In a recent case, the Mississippi Supreme Court having before it a change of channel, with resulting accretions "*which became a part of said sections* by the gradual movement of the river during the 30 year period from 1829 to 1858", very similar to that in the case at bar (when Respondent's Exhibit 1 or 9 is compared with Exhibit 11 or 13), declared:

"The presumption is also that the river, *as it gradually moved its bed,* CARRIED ALONG WITH IT *a water-covered width* at ordinary stages approximately equal to its original width."

U. S. Gypsum Co. v. *Reynolds,* 196 Miss, 644, 18 So. 2d 448.

"Where a water line is the boundary of a given lot, that line, *no matter how it shifts, remains the boundary,* and a deed describing the lot by number or name *conveys the land up to such shifting water*

line, exactly as it does up to a fixed side line. To the same effect is *Smith* v. *Leavenworth,* 101 Miss. 238, 57 So. 803."

Cox v. *Phillips,* (a Mississippi case) 5th C.C.A., 277 Fed. 414.

In another recent case from the Southern District of Mississippi, this point is discussed, and that decision alone should settle any possible doubt as to Respondent's title. From the court's opinion we quote as follows:

"In *Arkansas* v. *Tennessee,* 246 U.S. 158, 173, 38 S. Ct. 301, 304, 62 L. ed. 638, L.R.A. 1918 D, 258, it is said:

" 'It is settled beyond the possibility of dispute that where running streams are the boundaries between states, *the same rule applies as between private proprietors,* namely, that *when the bed and channel are changed by the natural and gradual processes known as erosion and accretion,* THE BOUNDARY FOLLOWS THE VARYING COURSE OF THE STREAM.' "

Hougue v. *Stricker Land & Timber Co.* (1934), 5th C.C.A., 69 F. 2d 167, at 168.

The area in controversy is situated in principle very much like the area (an island) in this *Hogue case.* In his concurring opinion Circuit Judge Sibley said:

"So much of that land (either the island in the *Hogue* case or the area in controversy in the case at bar) as is *not south of the point where the thread of the two channels of the river intersected* at the time the Eastern channel ceased to be a channel *belongs to the island* (or to Anderson-Tully Company, in the case at bar). So much of it as is *South* of that point is accretion to the Mississippi shore and not to the island and is in Mississippi." 69 F. (2d) at 169.

And when the case was shortly thereafter before the court on rehearing, the entire court declared: "only that to the south of the island could be in Mississippi". *Hogue* v. *Stricker Land & Timber Co.*, 70 F. 2d 722-723.

When this *Hogue* case is carefully studied, we submit that it is conclusive against the Petitioners in the case at bar, because the court vested title upon the location of the *thalweg* of the river *as it was at the time of the trial*, and recognized that that thalweg is *a constantly changing and shifting boundary line* unless and until it is fixed in an abandoned channel of the river by an avulsion.

In the case at bar the thalweg of the main channel of the Mississippi River has never ceased to *constantly* change, vary and shift since the original government land survey; but after the artificial *avulsion* (the Diversion Canal about 1903) which caused the Yazoo River to eventually abandon its former channel which formed the Western boundary of Petitioners' land, *the abandoned thalweg of the Yazoo River did become fixed*, thereby fixing the permanent Western Boundary of Petitioners' lands when water ceased to flow through the abandoned bed of the Yazoo.

It is this *fixed thalweg* of the Yazoo which, *as a matter of law*, is the permanent division line between the lands of Petitioners on the East thereof and the land of Respondent to the West thereof. This is the exact holding in the case of *Hogue* v. *Stricker Land & Timber Co., supra.* See also *Iselin* v. *LaCoste* (1944), 5th C.C.A., 139 F. 2d 887.

Numerous decisions of the Supreme Court of the United States are to the same effect. We select a few of them with which this Court is doubtless familiar.

"In *New Orleans* v. *United States*, 10 Pet., 662, it was said: 'The question is well settled at *common law* that the person whose land is bounded by *a stream of water which changes its course gradually by alluvial formations, shall still hold the same boundary, including the accumulated soil.* No other rule can be applied on just principles. Every proprietor whose land is thus bounded is subject to lose by the same means which may add to his territory, and as he is without remedy for his loss in this way he cannot be held accountable for his gain' ".

St. Clair County v. *Lovingston*, 23 Wall. 46-49, 23 L. ed. (90-93 U.S.) 59, at 63-64.

"Where a water line is the boundary * * *, *that line, no matter how it shifts, remains the boundary,* and a deed describing the lot by number or name conveys the land up to such shifting line exactly as it does up to a fixed side line and conveys all accretions thereto."

Jefferis v. *East Omaha Land Co.*, 134 U.S. 178, 33 L. ed. 872,

"It is laid down, however, by all the authorities, that, if the bed of the stream changes imperceptibly by the gradual washing away of the banks, *the line of the land* bordering upon it changes with it."

City of St. Louis v. *Rutz*, 138 U.S. 226, 34 L. ed. 941, at 949.

"It is settled law, that when grants of land border on running water, *and the* BANKS *are changed by that gradual process known as accretion,* the riparian owner's *boundary line still remains the stream,* although, during the years, by this accretion, the actual area of his possessions may vary."

"*Accretions, no matter to which side it adds ground, leaves the boundary still the center of the channel.*" * * *

"If (the river) be divided in the middle between the owners of the opposite banks, *that middle, though it changes its place, will continue to be the line of separation between the two neighbors.*" • • •

"The result of these authorities put it beyond doubt that accretion on an ordinary river would leave the boundary between two states *the varying center of the channel.*"

Nebraska v. *Iowa,* 143 U.S. 359, 36 L. ed. 186, 187, 188, and 189.

"It is the established rule that a riparian proprietor of land bounded by a stream, *the* BANKS *of which are changed* by the gradual and imperceptible processes of accretion or erosion, *continues to hold to the stream as his boundary.*"

Philadelphia Co. v. *Stimson,* 223 U.S. 605, 56 L. ed. 570, at 578.

"It is settled beyond the possibility of dispute that where running streams are the boundaries between states, *the same rule applies as between private proprietors;* namely, that *when the bed and channel are changed* by the natural and gradual processes known as erosion and accretion, *the boundary follows the* VARYING *course of the stream;* while if the stream from any cause, *natural or artificial,* suddenly leaves its old bed and forms a new one, by the process known as an avulsion, the resulting change of channel works no change of boundary, which remains in the middle of the old channel, although no water may be flowing in it, and irrespective of subsequent changes in the new channel. (cases cited)"

Arkansas v. *Tennessee,* 246 U.S. 158, 38 S. Ct. 301, 62 L. ed. 638, at 647.

> "When changes in the course of a stream, *the thread of which is a boundary* between states, takes place by the slow and gradual process of accretion, *the boundary moves with the shifting in the main channel's course.*"
>
> *Kansas* v. *Missouri*, 322 U.S. 213, 64 S. Ct. 975, 88 L. ed. 1234.

Applying the foregoing clear rule of law to the physical facts in the case at bar it is perfectly clear that the *V* boundary of Respondent's original Section 2, the West angle of which was the thalweg of the Mississippi River, the East angle of which was the middle of the Yazoo River, and the Southern apex of which was the intersection of these two thalwegs, has gradually and imperceptibly moved downstream Southward and Southeasterly *until that boundary has embraced the entire area in controversy* as a part of Anderson-Tully Company's original Section 2.

How utterly unrealistic then was that part of the trial court's Finding No. 7 which erroneously declared:

> "But these deposits of alluvion, in their progress, as to the area here in controversy, *were and are over that portion of the bed of the river owned by* (*Petitioners*), and were south and east of the line mentioned in Finding No. 6, lying between, or opposite, the (Petitioners') original uplands and the Mississippi-Louisiana State line, which latter line the Court finds was, AT ALL TIMES, *the western boundary of* (*Petitioners'*) *ownership herein involved*" (R.184).

This Court now knows that no deposit of any alluvion constituting any part of the area in controversy was *ever* made over *any* portion of the bed of the river *owned by Petitioners.* Accretion alluvion is always deposited in shallow water *against or near the* SHORE *line.* No such

deposit was ever near the *boundary line* of Respondent's land because that boundary line, the thalweg, was always the *deepest* portion of the river, where the current flowed with the greatest force preventing the deposit of alluvion, *the center of the channel of navigation.* Of course as this *very deep* thalweg *boundary* of Respondent's land gradually progressed Southward so also did the water retreating from Respondent's shore line to the North deposit alluvion in its shallow water, against *Respondent's shore* line, as it retreated. This deposit of the alluvion which formed the area in controversy was always *within* the triangle of Respondent's boundary, and therefore *always* on that portion of the bed of the river which by Mississippi law was *owned by Respondent* or its predecessors in title.

Also how utterly repugnant to, and violative of, the foregoing principles of law was the trial court's Conclusion No. 5, particularly as to the italicized words, reading as follows:

> "5. That title in this case, and consequently ownership, is *not* determinative upon the manner in which the accretions commenced or continued, and the mere fact that the accretions in question commenced by being physically attached to (Respondent's) land above water does *not* serve to vest (Respondent) with legal title or right thereto *when the formation passed laterally the line of (Respondent's) coterminous owner*—in this case (Petitioners)—in the southerly progress and formation of these deposits of alluvion" (R.186-187).

As the Circuit Court of Appeals held, this Court now knows that the accretion formation NEVER "passed laterally" *any* boundary line of Petitioners. Their boundary line was always under water far ahead of Respondent's

advancing accretions. East and West *never met* on the area in controversy.

The fallacy of Petitioners' contention is that they refuse to apply to the Yazoo River as a boundary stream all of the principles of law cited in this Point.

Riparian Access to Navigation rights. Petitioners' argument, when stripped of its obtuse points, can be stated as follows:

> *"We were riparian in* 1822, *or in* 1828, *or in* 1830 (See Exhibit 1), *and our title then went to the Mississippi River. Regardless of the position of the Rivers at the present time our boundaries must now be still determined as if they were coincident to the boundary of* 1822, *and as if the vagrant Rivers had never changed."*

To adopt this theory that "once riparian always riparian" is to do complete violence to the well established rules of property of the ancient common law, to all of the pertinent decisions of the Supreme Court of the United States, and to *all of the decisions of the Mississippi Supreme Court,* as well as those of all the courts of all the other common law states, some of which have been cited *supra.*

There has been at all times (1) a definite thalweg of the Mississippi River and (2) a definite thalweg of the Yazoo River, even though both were constantly changing lines as is *always the case where a river is concerned.* The shifting nature of these lines is recognized by all courts, including the Mississippi courts, when they state that *the thalweg remains the boundary* wherever it may be.

True *one* of the theories by which alluvion is gained by riparian owners is that a riparian owner is entitled to

access to the *water,*—that is *navigation* rights. But *this access was never denied to Petitioners here* until *the United States Government* (not the Respondent) diverted the Yazoo River into another channel. Until that time Petitioners continued to be riparian to the *navigable* Yazoo River, *and by going down that river to its mouth* they continued to have open water, and easy access to the rambling Mississippi.

Of course this artificial *avulsion* in 1903, *after* the area in controversy had been formed, did later forever "fix" as the thereafter unchanging permanent boundary line, definite and certain, the Western boundary of Petitioners' land at the thalweg of the Yazoo when that river ceased to flow as the result of this diversion cut-off avulsion. The entire process prior to 1903 was merely a gradual and natural substitution of the rivers to which Petitinoers' land was riparian.

Respondent earnestly submits that when the authorities cited in this Point have been reviewed and applied to the established physical facts before the Court, *including the flowing channel of the Yazoo River* as well as that of the Mississippi, the Petition for Certiorari must be denied. The vagabond thalwegs of the forever traveling rivers will not be ignored by this Court as they were by the trial court in its decision (R.185(9)).

POINT II

THE LAW OF THE THALWEG

Because "the Law of the Thalweg" is fundamental to a correct decision in this case, and because Petitioners induced the District Court to refuse to apply this law to the Yazoo River as the common boundary line between the land owned by Petitioners and the land owned by Respondent, we devote a separate Point to this principle for the sake of emphasis.

Petitioners' *only* expert (†) witness misled the District Court into its initial serious legal error, and subersive false premise. The lower court based its judgment on *"the line fixed by Mr. Corneil,* being a line from the point of division (the last center line of the old bed of the Yazoo River) where same reached the *original* east *bank line* extended to the Mississippi River * * * as fixed by the applicable Government land surveys" *in* 1822 (R.185).

The *inexpert* R. F. Corneil, in both his testimony and on his Map (Petitioners' Exhibit "I"), entirely ignored not only the actual *thalwegs* involved but even the very flowing water of the large Yazoo River itself as it existed in 1822. Compare Respondent's Exhibit 1, admittedly correct, with said Petitioners' Exhibit "I". Mr. Corneil ignored *every* official Mississippi River Commission survey and map. He was even unable to correctly define the word *"thalweg"*, but fallaciously assured the court under his oath that the volume, depth and current of the water had *nothing whatever* to do with the thalweg, or the problem here involved. He testified:

> "A definition of what constituted the *thalweg* of a stream is 'it is the merging of the waters of

the stream'. *The thalweg has nothing to do with navigation whatsoever.* There is a great distinction in my mind between the thalweg and the thread of a navigable stream, the difference being that the *'thalweg, as I understand, is a mixture of the waters of the two streams as they are the same consistency* and the thread of the stream in the center of the current of the two streams' " (R.170-171).

He then frankly admitted:

> "In making my survey and map I took the original township plats *and* BUILT *the additional information on Exhibit 'I'.* I did not use the Mississippi River Commission chart of 1878-80 nor the chart of 1913-15 but only the *bank line* of 1937. My reason was, *'We were not interested in how the land formed.* All we were interested in was the ownership plats *as they were drawn in* 1822 and where the *bank line* was in 1937'. I did not use the Mississippi River Commission maps of 1880 and 1913-15 for the reason that: 'I did not think that they were material in this particular case' " (R.171).

When pressed to explain *why* he did not use these official surveys and charts he lamely declared: "I did not choose to use them. * * * I did not use them. I do not know of any particular reason why I should or should not; I did not choose to, and that's the answer to your question, sir" (R.174). At the suggestion of the Judge he later added that he did not think they were material to this particular case (R.175).

This confession and its result (Petitioners' Exhibit "I") are most astonishing to anyone familiar with accretions and the law of the thalweg. Whatever else Mr. Corneil may have been, he most certainly was not an exper-

lenced and conscientious potamologist, as were Respondent's witnesses Mr. Richardson, Major Smith, and General Tyler.

The courts universally disagree most emphatically with Petitioners' *sole* witness Corneil.

The Supreme Court of Mississippi, in discussing the question of whether a state boundary line is middle way, or equidistant, between the banks of a river which separates states or follows the *thalweg* (*the deep center of the navigation channel*) of the river, correctly holds:

> "We think the decisions of the United States Supreme Court are *final authority* upon this proposition, that court having original jurisdiction to settle disputed boundaries between the states, *and whatever rule the state may have adopted is not final authority upon the question of boundaries,* but would be subject to the control of the decisions of the United States Supreme Court upon such questions. That Court has had occasion to deal with the subject in a number of cases, and in the case of *Iowa* v. *Illinois,* 147 U.S. 1, 13 S. Ct. 239, 37 L. ed. 55, fully considered and elaborately discussed the question, and reached the conclusion that the true boundary is *the middle of the main channel of navigation* of the Mississippi River, where that river constitutes the boundary line."
>
> *Hill City Compress Co.* v. *West Kentucky Coal Co.,* 155 Miss. 55, 122 So. 747.

The Supreme Court of the United States in the case of *Arkansas* v. *Tennessee,* 246 U.S. 158, 38 S. Ct. 301, 62 L. ed. 638, followed the well established Federal rule that "*the* THALWEG, *or middle of the navigable channel, is to be taken as the true boundary line between independent* states", and added:

> "The rule thus adopted, known as *the rule of the* THALWEG, has been treated as set at rest by that decision (*Iowa* v. *Illinois*, 147 U.S. 1, 13 S. Ct. 239, 37 L. ed. 55). *Louisiana* v. *Mississippi*, 202 U.S. 1, 49, 26 S. Ct. 571, 50 L. ed. 913, 930; *Washington* v. *Oregon*, 211 U.S. 127, 134, 29 S. Ct. 47, 53 L. ed. 118, 120, 214 U.S. 205, 215, 53 L. ed. 969, 970, 29 S. Ct. 631. The argument submitted in behalf of the defendant state in the case at bar, including a reference to the notable recent decision of its Supreme Court in *State* v. *Muncie Pulp Co.* * * *, *has failed to convince us* that this rule ought now, after the lapse of twenty-five years, to be departed from."
>
> *Arkansas* v. *Tennessee*, 62 L. ed. at p. 646.

This Court there also pointed out: "It is settled beyond the possibility of dispute that where running streams are the boundaries between states, *the same rule applies as between private proprietors.*" 62 L. ed. at p. 647.

Incidentally this case of *Arkansas* v. *Tennessee, supra,* contains practically all the law which the court needs to apply for the solution of every substantial question which has been raised in the case at bar.

The Mississippi courts expressly recognize this settled "law of the *thalweg*".

In *Hill City Compress Company* v. *West Kentucky Coal Co., supra,* 155 Miss. 55, 122 So. 747, the court stated:

> "It is the *contention of the appellant* that the center of the river, within the meaning of the law defining boundaries of the state, is the *center of the stream between banks* and not the *center according to the thread or* THALWEG *of the stream.*"

But the Supreme Court rejected this contention and emphatically held the law in Mississippi to be that:

> "The ownership of the complainant on the East bank of the old Mississippi river, now the Yazoo Canal, *originally extended to the* THALWEG *of the river;* in other words, the plaintiffs' land extended to the center or *thread* of the stream, or whatever point was the boundary between the State of Louisiana and the State of Mississippi at the time of the avulsion of 1876."

The court expressly followed the Federal decisions that: "It is very evident that these terms, '*middle* of the Mississippi river', and '*middle of the main channel* of the Mississippi river', and 'the *center of the main channel* of that river', as thus used, are synonymous."

In *U. S. Gypsum Co.* v. *Reynolds,* 196 Miss. 644, 18 So. 2d 448, the court again referred to the "*thalweg*" of the river in approving the apportionment of the accretion area there made by Engineer St. George Richardson, *based* on "*the thalweg* of the river".

The Circuit Court of Appeals, Fifth Circuit, frequently dealing with Mississippi riparian lands, has also expressly recognized the law of the thalweg in this language:

> "Upon the admission of Mississippi in 1817, the *middle thread* or *thalweg* of the main channel of the river became the boundary line between that state and Louisiana", citing *Louisiana* v. *Mississippi, supra, Iowa* v. *Illinois, supra,* and *Arkansas* v. *Tennessee, supra.*
>
> *Hogue* v. *Stricker Land & Timber Co.,* 69 F. 2d 167 at 168, and 70 F. 2d 722-723. See also, *Iselin* v. *LaCoste,* (C.C.A. 5th) 139 F. 2d 887.

It is therefore perfectly clear, as a matter of law, that the exact location of the *thalweg* of *both* the Mississippi River *and the Yazoo River,* as they lay East and West

of Respondent's original land and the area in controversy, have at all times been of vital importance in the case at bar. *Both* these thalwegs, *always,* and at any particular time that may be under consideration, have constituted the Eastern and Western boundaries of Respondent's land extending *Southward* to the point of intersection of these two thalwegs *below the mouth of the Yazoo River.* The Circuit Court of Appeals, Fifth Circuit, even before the instant case, has clearly recognized this principle of law by using the following language:

> "The evidence fails definitely to locate the point South of the island (here Respondent's land) *at which the thread or channel of the Eastern chute,* as it existed when it ceased to flow and became a fixed state boundary, *joined with the* THEN *thread or channel of the Mississippi River;* so that it was not established that any of the accreted land South of the Island is in fact *below the junction point* and therefore part of the Mississippi shore and within the territorial jurisdiction of the court."
>
> *Hogue* v. *Stricker Land & Timber Co.,* (C.C.A. 5th), 70 F. 2d 722, at 723.

Therefore Petitioners' *single* witness surveyor Corneil was very much mistaken in *assuming* that the thalwegs of the rivers here involved were of no importance. This false legal premise resulted in the false conclusions shown on his Exhibit "I" map, erroneously adopted by the District Court.

Furthermore, a matter of *law,* the division line fixed by the judgment of the District Court could not possible have been right *even in* 1822 when the Original Government *Land* survey was made.

The Court will notice both on Corneil's Exhibit "I" and on Respondent's Exhibit 1, and on all other maps showing the Northern boundary of the area in controversy, that the diagonal line fixed by Mr. Corneil, and adopted by the District Court, runs from the center of the thread of the old Yazoo River directly past, *and against*, the very South *bank-line* tip of Respondent's original above-water land surveyed in 1822 as Section 2.

Mr. Corneil admits that the exact location of this line fixed by him as the Northern boundary of Petitioners' claim to the area in controversy is correctly shown on Respondent's Exhibits: He testified: "Defendants' Exhibit 3 accurately portrays the location of the line of division running South 68 degrees 42 minutes West which I have marked on my Exhibit "I" (R.171). So there is no issue of *fact* here.

BUT at that very time (1822) the West *and South* boundary of Respondent's Section 2 did *not* stop at the meandered *bank-line*, nor at the bank-line tip, as erroneously assumed by Mr. Corneil. Instead, under the law of the thalweg, the actual Western and South boundary of Respondent's original Section 2 extended to the *thalweg* of the Mississippi River as *it then existed*, and its Eastern boundary extended to the *then* thalweg of the Yazoo River, *the South tip of its land being even then, in* 1822, *at the intersection of these two thalwegs.*

The uncontradicted testimony of Mr. Richardson is that the long Southward extension of the junction of these two thalwegs was caused by the large under-water sandbar "attached to the Southern portion of Section 2 of the Anderson-Tully Company lands at the time of the Government survey" extending far down stream, thus accounting "for the extreme width of the Mississippi

River at this point at that time" (R.33). This sandbar was in existence in 1821 when Young and Poussin made their survey, as shown by Respondent's Exhibit 7 (R.32).

This intersection of the two thalwegs marking the Southerly extent of the ownership of Respondent's Section 2 in 1822, at the repeated insistence of Petitioners' counsel, was fixed as being almost due South of the land point of Section 2 and West of the North boundary line of Petitioners' Lot 3 of Section 3 East of the Yazoo River (R.69), as indicated by the dark blue pencil lines drawn by Mr. Richardson on Respondent's Exhibit 1 (R.67-68).

No witness even undertook to contradict Mr. Richardson's conclusions, and the thalweg lines on Respondent's Exhibit 1 must stand as an established *fact* in the case.

That Petitioners and their expert witness Corneil are wholly unjustified in taking the *meander lines* of 1822 to be boundary lines is easily proved as follows:

> "In *St. Paul & P. R. Co.* v. *Schurmeier*, 74 U. S. 7 Wall. 272, this court said: '*Meander lines* are run in surveying fractional portions of the public lands bordering upon navigable rivers, *not as boundaries* of the tract, but for the purpose of defining the sinuosities of the *banks* of the stream, and as the means of ascertaining the quantity of the land in the fraction subject to sale, and which is to be paid for by the purchaser. * * * *the water course, and not the meander line, as actually run on the land, is the boundary.*' "
>
> *Jefferis* v. *East Omaha Land Co.*, 134 U.S. 178, 33 L. ed. 872, at 878.

"*A meander line is not a line of boundary,* but one designed to point out the sinuosity of the *bank*

or *shore*, and a means of ascertaining the quantity of land in the fraction which is to be *paid for* by the purchaser. (cases cited).

Whitaker v. *McBride*, 197 U.S. 510, 25 S. Ct. 530, 49 L. ed. 857, at 860.

The testimony and Exhibit "I" of Petitioners' *lone* witness Corneil frankly reveals that Mr. Corneil was happy in complete ignorance of this legal fact,—just as he knew *nothing* whatever of "the law of the thalweg", and precious little of the law of accretion.

Since in Mississippi the boundary of the riparian owner is the *thalweg* of the river, it is perfectly clear from the decisions last above cited that the *meander lines* of the original 1822 survey as shown on Respondent's Exhibit 1 are *not the boundaries* of the land to which the original patentee from the government received title, as Mr. Corneil and the District Court erroneously assumed.

All *competent* surveyors, as explained by Mr. Richardson in his evidence, are perfectly familiar with this surveying rule as established by the General Land Office of the United States.

Since from the admitted history of the area in controversy the Court knows that it was building Southward at the time of the 1822 survey, and has consistently continued to build Southward since that date until the present time, this necessarily means that the intersection of the thalwegs of the Mississippi and Yazoo Rivers has constantly, consistently and progressively moved Southward down stream until it became finally *fixed permanently entirely beyond Petitioners' land* when the Yazoo ceased to flow and have a thalweg.

But the point of law now being stressed is that the *meander lines* of 1822 did not fix anybody's riparian rights. We have shown in Point I that all the riparian boundaries involved were constantly changing, varying and shifting. If the court were to take any starting point at all it would be at *the date the United States first conveyed* its title to Respondent's Section 2, because the government's patent conveyed *all accretions* which had then formed Southward from Section 2 and the bed of the Mississippi River to its thalweg *as it existed at the date of its patent.*

> "The patent passes the title of the United States to the land, not only as it was at the time of the survey, *but as it is at the time of the patent.*"
>
> *Jefferis* v. *East Omaha Land Co.*, 134 U.S. 178, 33 L. ed. 872, Headnote 6.

The Supreme Court then recalled the principle that the description as originally surveyed by the government *always includes all accretions* which have been added to that description *at the date of each subsequent conveyance.* In the case at bar we are interested in Lots 5 and 6 of Respondent's Section 2 to which all accretions here involved have been added (R.182 (2)). In the *Jefferis* case the original description was "Lot 4". By substituting Respondent's *Section* 2 for "Lot 4," the court will doubtless agree that the following quotations completely supports Respondent's title in the instant case:

> "All the grantors in the deeds made subsequently to the patent, including the patentee, described the land in their successive deeds as lot 4. *It is contended by the defendant that this description conveys the land as it was at the date of the entry,* or, at most, at the date of the patent; * * *. BUT, *we think that in all the deeds the accretion passed*

by the description of the land as lot 4. In making *every deed* the grantor described the land simply as lot 4 * * *. It must be held, therefore, that each grantor, by his deed, conveyed all claim *not only to what was originally lot* 4, *but to all* ACCRETION *thereto.*" * * *

"*The same is the case with each successive grantor,* and each must be held to have passed by his deed his title to all the land up to the river, *as the river was at the date of his* deed."

Jefferis v. *East Omaha Land Co.*, 134 U.S. 178, 34 L. ed. 872, at p. 879.

Petitioners' Exhibit "A" to their Complaint clearly shows what was conveyed to respondent Anderson-Tully Company by its deed from Hogue Brothers (R.16) "as the river was *at the date of its deed*" (R.128),—being all of the area here in suit.

So, in no event can the Corneil Map (Petitioners' Exhibit "I") be legally correct; and it was clearly erroneous for the District Court to base its decision upon it.

POINT III

THE CONTROLLING LAW OF ACCRETION

In oral argument before the Circuit Court of Appeals counsel for Petitioners frankly conceded that if the law of *accretion,* as established by the common law, is applicable in Mississippi then the area in controversy is owned by the Respondent. At page 22 of their brief here they continue to urge that: "It is not the technical *law of accretions* • • • that here governs."

To the exact contrary, we submit that the common law doctrine of accretion *does* govern here, and is just as applicable to property in Mississippi as in any other common law State. What then are the principles of the law of accretion which are controlling in the instant case?

Accretion must be formed *against the shore line of the claimant.*

The Finding of the trial court explicitly establishes the physical fact that the area here in controversy is such *accretion* to Respondent's land in the following emphatic language:

> "2. Since 1822 the area in controversy has been formed by the gradual and imperceptible addition of alluvion *as accretion to said original Section 2, Choctaw District, now owned by the defendant Anderson-Tully Company,* said accretion progressing gradually downstream to its terminating point at the present time." (R.182).

This settles that fact here. Rule 52 of the Federal Rules of Civil Procedure.

What, then, are the necessary *legal* implications of that *fact?*

Well, nothing has been more definitely settled since the days of the ancient common law than that land formed by gradual and imperceptible *accretion*", or by the gradual recession of the water, *belongs to the owner of the contiguous land to which the addition is made.* That the accretion *must always be formed against,* and become a part of, THE SHORE LINE of land in place *above the water line.*

An island can never be accretion to the mainland because it is separated from the mainland *by water. Accretion can never cross a flowing stream.*

That is why the area in controversy could *never* have been accretion to Petitioners' land East of the separating Yazoo River, because when it was being formed the area in controversy was *always* on the opposite side of the deep, wide, flowing Yazoo River.

Also for this reason, none of the various rules for apportioning *accretion* land could *ever* be applied to the area in controversy. No part of the area in controversy could possibly be accretion to any part of Petitioners' land because no part of it ever formed *against their shore line* so as to form an integral part and component part of it.

Mr. St. George Richardson correctly pointed out that it was a physical impossibility to legally apportion any part of the area in controversy as accretion to any part of Petitioners' land (R.63-64, 75, 77-78, 84, 89).

Accretion defined. We know of no clearer statement of the universal general principles of accretion law applicable here than that found in *Thompson on Real Property,* as follows:

"'*Accretion*' has been defined to be the increase of land, caused by the addition made by the washing of the sea, *a navigable river, or other watercourse* to which the land is *contiguous*, whenever the increase is so gradual that it cannot be perceived at any one moment of time. The process must be gradual, as distinct from a sudden change. The test as to what is gradual and imperceptible is that, although persons may see from time to time that progress has been made, they could not perceive it while the process was going on. 'Accretion' denotes the act of depositing, by gradual process, of solid material in such a manner as to cause that to become dry land which was before covered by water, while the material thus deposited is called '*alluvion*'."

Thompson of Real Property, Permanent Edition, Vol. 5, Sec. 2545.

"*To the owner of the* SHORE belong these imperceptible and gradual additions to his land, which, when once acquired, *becomes in all respects a part of the original tract.* The right of *title and possession of land formed by accretion follows the ownership of the riparian lands to which it is* ATTACHED. Accretions to land pass with a conveyance of the uplands as an incident and appurtenance thereto unless a contrary intention appears in the deed. Where a stream forms the boundary line and the boundary bank is changed by the process of accretion or erosion, *the boundary, whether private or public, follows the stream.* When grants of land border on a stream and the course of the stream is changed by the gradual washing away on the one side and the gradual building up on the other, *the owner's boundary changes with the changing course of the stream.* Where a water-line is the boundary of a lot or tract of land, *such line, no matter how it shifts, remains the boundary*, and a

deed describing the lot or tract by number or name conveys the land up to such *shifting* line exactly as it does up to a fixed side-line and conveys all the accretions thereto. The same rules apply to land gained by reliction. The courts have not fully agreed as to the reasons for this rule. Some take the view that it is because it falls within the maxim *de minimis lex non curat*; while others hold that, because the riparian owner is liable to lose soil by the action or encroachment of the water, he should also have the benefit of any land gained by a like action. *Under the common and civil law, when a river occupies land by erosion, the landowner loses title.* It seems that the rule rests upon a much broader principle and has a much more important purpose in view, namely, that valuable rights incident to a water boundary should not be destroyed by slight changes in the shore-line. *The right of the riparian proprietor to alluvion is* INDEPENDENT *of law governing the title in the soil covered by the water.*"

Thompson on Real Property, Permanent Edition, Vol. 5, Sec. 2546.

Quoting also from *Section* 2548 *of Volume* 5 *Thompson* we find this additional statement:

"* * * before one can successfully establish a right to land on account of its being accretions thereto made by alluvion deposits, he must first show he owned *the* SHORE *to which or whereon the accretions were deposited.*"

The Mississippi Courts do not differ from this general rule, as is shown by the case of *Smith* v. *Leavenworth*, 101 Miss. 238; 75 So. 803, wherein the *general* rule was stated and followed in this language:

"This alluvion became the property of *the owners of the mainland,* constituting a part of each section *to which it formed* • • •."

There we have the applicable Mississippi rule of property in so many words.

Completely supporting the eminent Mr. Thompson and the exceptionally qualified Mr. Richardson, we present the following quotations, offered to clarify and emphasize this important, and in this case decisive, point.

"'*Accretion*' may be defined as an *addition* to riparian land gradually and imperceptibly made *by the water to which the land is contiguous,* or, in another sense, as the *process* by which such addition takes place."

45 *Corpus Juris,* 522, Sec. 188.

"'*Alluvion*' is frequently defined in the same terms as is accretion • • •. The distinction, however, which is sometimes drawn between alluvion and accretion is that the term '*alluvion*' *applies to the deposit itself* while '*accretion*' *rather denotes the act or process.*"

45 *Corpus Juris,* 523, Sec. 189.

"*Continuity.* There must be a natural and *actual continuity of the accretion to the land* of the riparian owner. *The right to accretion does not extend to the opposite side of a natural navigable channel* which is separated from another navigable stream by flats or marshland. On the other hand the presence of depressions, swales and sloughs in land *thrown up against* A SHORE LINE, does not necessarily determine its character or that it is not an accretion to the riparian land."

45 *Corpus Juris,* 528, Sec. 196.

"*Accretion* is the increase of real estate by the gradual deposit, *by water*, of solid material, whether mud, sand or sediment, so as to cause that it becomes *dry land* which was before covered by water. It is said to rest in the law of nature, and is analagous to the right of the owner of a tree to its fruits, and the owner of flocks and herds to their natural increase. * * * The term 'alluvion' is applied to the deposit itself, while accretion denotes the act."

1 *Ruling Case Law* 226, Sec. 1.

"The fact that the dividing line between the owners of opposite sides of a non-navigable river is the middle of the river does not limit them to accretions between *their* SHORE *and the boundary line as it existed before any changes were made, as the boundary line is merely an imaginary one,* AND CHANGES WITH EVERY CHANGE IN THE BED OF THE STREAM."

1 *Ruling Case Law* 229, Sec. 3.

"It is *fundamental in the law of accretions* that *the land to which they attach* must be *bounded by the water* to entitle its owner to such increase. In the very nature of things, accretions depend upon *actual contiquity* * * *. *Accretions* must, as a rule, *in their formation preserve uninterupted* CONTIGUITY."

1 *Ruling Case Law* 232, Sec. 6.

"*Point of Commencement.* To entitle the riparian owner to the alluvion the accretion *must begin from his land* and not from some other point so as to finally reach his land."

45 *Corpus Juris* 527, Sec. 195.

In reading the decisions, it will be found that the word "contiguous" means *in actual contact with*, touching, ad-

joining, abutting, coterminous, attached or added to. These are all synonymous words used interchangeably.

> "*This alluvion became the property of the owners of the mainland,* CONSTITUTED A PART OF EACH SECTION TO WHICH IT FORMED."
>
> *Smith* v. *Leavenworth,* (1911), 101 Miss. 238, 57 So. 803.

> "Accretion or alluvion is *an addition to riparian land made by the water to which the land is* CONTIGUOUS, so gradually and imperceptibly that, though witnesses may see from time to time that progress has been made, they could not perceive it while the process was going on."

> "* * * *the alluvion formed by the accretion will be found, as an ordinary rule, to run along the* SHORE *in what may be roughly termed parallel lines as related to that* SHORE."
>
> *Sharp* v. *Learned,* (1943), 195 Miss. 201, 14 So. (2d) 218.

The Supreme Court of Mississippi has thus clearly recognized and applied the common law doctrine of accretion which may be briefly stated as follows:

> "*Title to Alluvion.* Land formed by accretion belongs to the riparian owner upon or *against whose* BANK OR SHORE *the alluvial matter is deposited,* the principle applying to navigable streams as well as to those not navigable, and also to streams that are the boundary between two states."
>
> 67 *Corpus Juris* 825, Sec. 230.
>
> 45 *Corpus Juris* 524, Sec. 192, and numerous cases cited in Footnote 20.
>
> *St. Clair County* v. *Lovingston,* (1874), 23 Wall. 46-69, 23 (90-93) U.S. Law Ed. 59, at 63-64.

Jefferis v. *East Omaha Land Co.*, (1889), 134 U.S. 178, 33 L. ed. 872, 876-877.

Nebraska v. *Iowa*, 143 U.S. 359, 36 L. ed. 186, at 189.

Arkansas, a common law state like Mississippi, is said to have more miles of navigable streams than any other state in the Union. This has resulted in a very large number of accretion decisions. One of the leading accretion cases is that of WALLACE v. DRIVER, 61 Ark. 429, 33 S.W. 641. The Supreme Court of Mississippi in the case of *Smith* v. *Leavenworth*, (1911), 101 Miss. 238, 57 So. 803, based its decision on two other Arkansas cases. Therefore the following language is also good law in Mississippi, to-wit:

> "Hence, land formed by alluvion, or the gradual and imperceptible accretion from the water, and land gained by reliction, or *the gradual and imperceptible recission of the water*, belongs to the owner of *the* CONTIGUOUS *land to which the addition is made*. This rule has been vindicated by someone on the principle 'that he who sustains the burden of losses and of repairs, imposed by *the contiguity of* WATER ought to receive whatever benefits they may bring by accretion. By others it is derived from the principle of public policy that it is the interest of the community that all land should have an owner, and most convenient that *insensible additions to the* SHORE *should follow* THE TITLE TO THE SHORE ITSELF.' *New Orleans* v. *United States*, 10 Pet. 662, 717; *Jefferis* v. *East Omaha Land Co.*, 134 U.S. 178; *Nebraska* v. *Iowa*, 143 U.S. 539; *Gould on Waters*, Sec. 155; 2 *Blackstone* 262."

> "In order to constitute *an accretion*, it is not necessary that the formation be indiscernible by comparison at two distinct points of time. It is true that *it is an addition to riparian land*, 'gradual-

ly and imperceptibly made by *the water to which the land is contiguous'*; but the true test' as to what is gradual and imperceptible in the sense of the rule is that, though the witnesses may see from time to time that progress has been made, they could not perceive it while the process was going on.' *Rex* v. *Lord Yarborough*, 3 B. & C. 91, is an illustration. In that case the court held that 450 acres of land formed by the gradual deposit of ooze, sand and soil from the sea, belonged to the owner of the *adjoining land* as an accretion. Other cases to the same effect may be cited. *Jefferis* v. *East Omaha Land Co.*, 134 U.S. 178."

"What has been said of accretions is equally true of the loss suffered from the gradual encroachments of *running streams. As their beds change imperceptibly by the gradual washing away of the* BANKS, *the boundary lines of contiguous lands change with them*; and the owner, *having, in the beginning, acquired no fixed freehold* in them, but one that *shifted with the changes*, is limited and confined, in the extent of his rights and possession, *by the new boundaries* (cases cited)."

Wallace v. *Driver*, 61 Ark. 429, at 431-432, 33 S.W. 641.

This is the general property rule in *all* common law states.

It is perfectly clear from the foregoing authorities that alluvion, formed by accretion, is *never* applied to a formation on the bed of the stream unattached to the *bank* or *shore line.*

A formation on the bed of a stream in Mississippi owned by the riparian properietor, is always a sand bar, towhead or *island*, and is governed by entirely different laws.

The area in controversy in the case at bar is strictly, literally and legally alluvion deposited by the process of accretion against, and added to and from, the *bank* and *shore line* of Respondent's original Section 2 (R.182 (2)). No part of it was ever as accretion against Petitioners' shore line on the opposite side of the Yazoo River.

Hence, by all of the foregoing authorities cited in this Point, the title to the *accretion alluvion* here involved is unequivocally *by law* vested in respondent Anderson-Tully Company, the owner of the mainland upon and against whose bank or shore line the water of the Mississippi River made the deposit.

In the case at bar Petitioners urge that they acquired a "*fixed* freehold" in the *then* bed of the Mississippi River as it ran in 1822, and that their title so acquired has never been lost notwithstanding the transitory shifting of that original *bed* for more than a mile West of its former location. This is absolutely contrary to all accretion law of which we have any information. Such a hoding would disrupt present titles to hundreds of thousands of acres of accretion lands in the entire alluvial valley of the Mississippi River system.

Since Petitioners argue that riparian rights give a riparian owner title to the land from his shore to the thalweg, how can the Court deny to respondent Anderson-Tully Company the ownership of this tract of land lying between its old shore line on the East and South and the thalweg of the Yazoo River?

The Cairo, Illinois, peninsula (see Exhibit 44). We close this Point on the "Law of Accretions" by stressing the fact that the judgment of the trial court in this case is both novel and shocking in accretion law. To allow such

a conception of accretion law to stand would annul titles to thousands of acres of alluvial land of incalculable value.

As General Tyler stated, the situation presented by this case is *typical* "of a tributary coming into a larger stream" (R.107). Similar situations abound throughout the entire alluvial valley of the Mississippi River from Cairo to the Gulf. We select only one illustration other than the case at bar, viz., the Cairo peninsula at the very head of the valley. The Court will take judicial knowledge of that situation. 20 *American Jurisprudence* 79, Section 56; 31 *Corpus Juris Secundum* 577, 579, Section 33 (a) and (b); and cases there cited.

The *accretion* area south of the City of Cairo, comparable to the area here in controversy, is plainly visible on Respondent's Exhibit 44, or on any other aerial photograph of that area.

Looking northward upstream, the Mississippi River is to the left and West of the Cairo peninsula, exactly as is true in the case at bar.

The Ohio River is to the right East of Cairo and the peninsula, corresponding to the Yazoo River in the instant case.

It is plainly seen from the picture that at some former time the confluence of the Ohio and Mississippi rivers was immediately North of the present location of the City of Cairo, analogous to Respondent's land in 1822 as shown on Respondent's Exhibit 1.

Nature's hydraulic laws, until man interferes, are immutable. The Court is therefore not surprised to see from the aerial photograph that throughout the long years of erosion and accretion a peninsula has been built south-

ward between the two rivers strikingly like the area here in controversy. The very City of Cairo itself is built on the upper end of this accretion area. Vast acres lie South below the city supporting railroad bridges to the East and to the West. The accretion area is even crescent shaped, as in the case at bar (R.108).

During these long years of accretion building, *the mouth of the Ohio river, and its thalweg, have been gradually extended downstream*, now far below the City of Cairo. During this process, the mighty Mississippi, "just like a big horse riding against a little horse" (R.107), has constantly shoved the tributary Ohio and its thalweg Eastward as its mouth extended downstream,—exactly as was true of the Yazoo in our case (R.107-108).

The *intersection* of the thalweg of the two rivers in the aerial picture has traveled South and Southeastward for a great distance South of Cairo and its starting point, always eroding and retreating before the advancing accretions, exactly as is true in the record here.

Now if the judgment of the District Court were correct, then Cairo and the Cairo accretion peninsula would be in the State of Kentucky, and would be owned by the Kentucky riparian owners along the East bank of the Ohio River corresponding to the Petitioners here. Wouldn't that indeed be astounding?

Who would now be so bold to assert that because those Kentucky lands were *once* riparian to the Mississippi in the latitude of Cairo and its peninsula they *must now* be still riparian and (under Mississippi or Illinois law) own right over to the *present* thalweg of the Mississippi River because it was *once* the Missouri-Kentucky State line?

But that is exactly what Petitioners now urge. The trial court agreed with them and their Mr. Corneil (R. 185(9)). The Circuit Court of Appeals merely corrected these obvious errors in conformity to the long settled and universally recognized law of accretion which is also applicable to the Yazoo River in Mississippi.

Would any one be now so rash as to assert that Cairo and its accretion peninsula is not a part of, and owned by, the State of Illinois?

This is just what the trial court did to Respondent as to its accretion area here involved.

Res ipsa loquitur.

POINT IV

THE AVULSION WHICH FIXED PETITIONERS' PERMANENT WEST BOUNDARY LINE

It is equally well settled that as to AVULSIONS the law is the *very reverse* of what has been said about the constantly shifting and varying boundary lines caused by gradual and imperceptible erosion and *accretion.*

Where a stream which forms a boundary line of lands from any cause, *natural or artificial,* suddenly abandons its old and seeks a new bed, such avulsive change of channel does definitely fix the *permanent boundary* which is traced on the ground by the thalweg of the abandoned stream.

In their brief, Petitioners have limited their discussion almost entirely to the Western and Southern boundaries of the area in controversy which have from time immemorial been changing and shifting with the thalweg of the rambling Mississippi River, the mysterious vagaries

of which grand old unstable stream have caused much litigation for many years. But they ignore the legal fact that the *Eastern boundary line* of the area in dispute was definitely settled, and became *fixed* and *permanent*, by an AVULSION, viz., the artificial diversion of the main channel of the Yazoo River through the Diversion Canal cut about 1903.

Most of the cases already cited in our Point I have also covered the law of avulsion.

> "An *avulsion* which caused the drying up of the old bed of a river separating two states *does* NOT *have the effect to establish as the boundary between them the ancient boundary as it existed at the time of the earliest record* (here the Government survey of 1822), with the effect of eliminating any intermediate shifting of the river bed due to erosion and accretion." (Headnote 5).
>
> "So long as the channel of a river separating two states, the course of which has been changed by an *avulsion*, remains *a running stream*, the boundary marked by it is still subject to be changed by erosion and accretion, BUT *when the water becomes stagnant, the boundary then becomes* FIXED *in the middle of the formerly navigable channel*, and the gradual filling up of the bed that ensues is not to be treated as an accretion to the shores, but as *an ultimate effect of the avulsion.*"
>
> *Arkansas* v. *Tennessee*, 246 U.S. 158, 38 S. Ct. 301, 62 L. ed. 638, Headnotes 5 and 6, and at p. 647.

This is the exact legal principle which the Circuit Court of Appeals applied to the undisputed historical physical facts in the case at bar.

> "It is equally well settled, that where a stream, which is a boundary, *from any cause* suddenly aban-

dons the old and seeks a new bed, *such change of channel works no change of boundary;* and that the boundary remains as it was, *in the center of the old channel, although no water may be flowing therein.* This sudden and rapid change of channel is termed, in the law, *an avulsion.* * * * *Avulsion has no effect on boundary, but leaves it in the center of the old channel.*"

Nebraska v. *Iowa,* 143 U.S. 359, 36 L. ed. 186, at 188.

"* * * the applicable rule established in this court, and repeatedly enforced, requires *the boundary line to be fixed at the middle of the channel of navigation as it existed just previous to the avulsion.*"

Arkansas v. *Mississippi,* 250 U.S. 39, 39 S. Ct. 422, 63 L. ed. 832, at 835.

This is also Mississippi law.

"In 1876 the Mississippi river, by *avulsion,* changed its channel, *and the boundaries of the Mississippi river as they existed prior to said* AVULSION *became a* FIXED *boundary line between the states of Louisiana and Mississippi.*"

Hill City Compress Co. v. *West Kentucky Coal Co.,* (1929), 155 Miss. 55, 120 So. 747.

"Avulsion is a change in a boundary stream so rapidly or so suddenly made, or in such short time, that the change is distinctly perceptible or measurably visible at the time of its progress. Or to state it otherwise, so far as concerns practical purposes, *when the change is not by accretion it is by avulsion.*"

Sharp v. *Learned,* (1943), 195 Miss. 201, 14 So. 218.

In short, only an *avulsion* permanently *fixes* a property, or state, boundary line so that it then ceases to con-

stantly vary with the shifting thalweg of the river. *Nix* v. *Dickerson*, (1902), 81 Miss. 632.

In the case at bar, the Diversion Canal of 1903 was an artificial avulsion *the result of which*, when the water ceased to flow through the abandoned former channel of the Yazoo River, permanently fixed the Eastern boundary line of the area in controversy, and the Western boundary line of all of Petitioners' lands referred to in this case as shown on Respondent's Exhibits 3 and 21.

This is the exact holding of the Circuit Court of Appeals, 5th Circuit.

It is therefore again, and finally, *very* clear that the original government General Land Office Survey of 1822 *did* NOT forever fix riparian boundary rights as contended by Petitioners, and as was erroneously assumed by the trial judge (R.185(9), (10) and 187(6)).

POINT V

DISTINGUISHING PETITIONERS' AUTHORITIES

1. *Island Law. Archer* v. *Southern Railway Co.*, distinguished.

Apparently the learned trial judge undertook to apply principles of law concerning *islands* to *accretion* areas, relying upon *Archer* v. *Southern Railway Co.*, 114 Miss. 403, 75 So. 251 (R.178). Petitioners would have this Court perpetuate that error.

This is wholly unjustifiable, and can lead only to hopeless confusion. Entirely different principles of law are involved in the respective instances of *islands* on the one hand and *accretion alluvion* on the other hand.

The *reason* that the riparian proprietor owns an *island* which arises from the bed of the stream between the mainland and his boundary thalweg of the river, is because in Mississippi (and in many other states such as Nebraska, Illinois, etc.) the riparian proprietor owns title out to the thalweg of the river. Therefore whatever is built on the bed of the river between the thalweg and the riparian bank line, *while he owns it*, necessarily belongs to the riparian proprietor. *There has been no change in his boundary line.*

On the contrary, the entire *reason* for *accretion* title is based on the change of boundary line as is shown by the numerous authorities cited in Points I and III of this brief.

The rationale of the decisions involving islands as given by Mr. *Thompson* in his book on *Real Property*, Section 2552, is as follows:

> "The reason for the rule that the owner of the mainland owns the intervening new *islands* to the middle of the thread of a stream is found in the fact that the new islands have been built up from the bottom of the river; and the owner of the mainland, *being also the owner of the bottom of the river to the middle thread of the stream*, owns the land to that point, whether it be under the water or above the water."

The fact that an island begins on the bed of a river and continues to be a part of the bed of the river is obviously entirely different from the facts in the case at bar, because the land in litigation was never a part of the bed of the river as such, but was an *addition to the* SHORE *line*. The area in controversy was always deposited against *Respondent's shore*, and on *Respondent's side* of its thalweg boundary.

In *Archer* v. *Southern Railway Co., supra,* in *City of St. Louis* v. *Rutz,* 138 U.S. 226, 34 L. ed. at 949, in *Whitaker* v. *McBride, supra,* and in every other case involving *islands* the island was formed on the bed of the river WHEN *that particular portion of the bed was still owned by the riparian proprietor.* Hence no one else could own this island. Title to the island necessarily followed the title to the foundation on which it rested, and of which it was a part.

In *St. Louis* v. *Rutz,* still relied on here by Petitioners, the court itself distinguished the physical facts there involved from the case at bar by explicitly describing the land there in litigation as being "*A deposit in that part of the bed of the river which was owned by him* (*here Petitioners*) in fee, BUT NOT AGAINST THE SHORE LINE AS AN INTEGRAL PART OF ANOTHER'S (here Respondent's) LAND."

Here *none* of the area in controversy could have possibly been deposited upon any part of the bed of any river to which Petitioners, or their predecessors, had title *at the time of the deposit.* On the contrary, it is undisputed that the area in controversy was deposited against the shore line of Respondent's land (R.182(2)), and *therefore on that part of the bed of the river* THEN *owned by Respondent.*

It also necessarily follows that if an island then proceeds to form itself on another part of the bed of the river THEN *owned by a coterminous neighbor,* of course that adjoining neighbor riparian proprietor owns that part of the island built on his part of the bed of the river for exactly the same reason that the first riparian proprietor had title to his part of the island.

This is the law not only in Mississippi but also in every other state in the Union which gives the riparian owner title to the thalweg of the stream.

> "Where an ISLAND in a navigable stream increases by accretions, a riparian owner cannot claim any part thereof extending beyond his boundaries, since however such accretions may be commenced or continued, the right of one owner of upland to follow and appropriate them ceases when the formation passes laterally *the line of his* COTERMINOUS *neighbor.*"
>
> *Archer* v. *Southern Railway Co., supra.*

But in the instant case, no such island had formed in the river West of Petitioners' shore line and East of their thalweg in the thread of the stream, or on that part of the bed of the river which they owned, *while they were riparian thereto.*

There was a sand bar in existence in 1914 (Respondent's Exhibit 18) a part of which Petitioners would have owned under the law of *Archer* v. *Southern Railway Co., supra,* IF that sand bar had grown into an island which continued as land in place. In fact, in their opening statement in the District Court Petitioners stated that the evidence would probably show the formation of such an island which became a part of the area in controversy. However, the later uncontradicted evidence of *all* of the expert witnesses, particularly that of Major B. Smith with his authentic Exhibits (R.96), conclusively proved that this 1914 sand bar was a "traveling bar" and proceeded to walk downstream entirely beyond Petitioners' property line, off all of the later maps in evidence, and out of the picture in this case.

This evidence of the experts, based on official maps, was also corroborated by the uncontradicted testimony of the living eye witnesses Captain Aubrey Haynes (R.116) and J. W. Taylor (R.116).

This Court takes judicial notice of:

> "• • • *mere sand bars,* which are frequently found in Western waters, and are of *temporary duration, existing today and gone tomorrow.*"
>
> *Whitaker* v. *McBride,* 197 U.S. 510, 25 S. Ct. 530, 45 L. ed. 857.

Therefore, in the case at bar this Court is not concerned by the law which is applicable *only* to *islands* built on the bed of a stream *at the time owned by a riparian proprietor.*

There have been a number of island cases in the State of Arkansas, one of which is very similar in principle to the Mississippi *Archer* case. In *Mills* v. *Protho,* 143 Ark. 117, 219 S.W. 1017, after holding that an island which formed in the bed of the stream *at the time* (by an Arkansas statute) *owned by the riparian proprietor* would be limited in its title to the boundary lines of the respective owners of the mainland (exactly as is held in Mississippi in the *Archer* case), the court was then careful to distinguish this island case from the numerous decisions involving alluvion formed as accretions to the mainland shore, expressly declaring: "*Nothing is said in the statute about acquisition of title by* ACCRETION." 143 Ark. at 121.

Unless this distinction is kept in mind there would be a hopeless confusion in the principles of the accretion cases hereinbefore cited with the island decisions now being considered.

When this distinction is kept in mind, all of the decisions may be read without confusion, being a harmonious statement of the whole law.

In *Archer* v. *Southern Railway Co., supra,* the Mississippi court in dealing with typical accretion lands used

the words "*adjoining*" and "*coterminous*" in the second paragraph of the opinion just exactly as we have used them in this brief. The court even instinctively distinguised between *water* and *land* by referring to the island formed "offshore", and "the *accretions* to the island" which "formed between the LANDS *of the coterminous* owner and the thread of the stream." The littoral lands of the parties of course were laterally "adjoining" on the same side of a single stream—otherwise there could not possibly have been any problem of apportioning the accretions. The opinion of the Circuit Court of Appeals below clearly points out that no such factual situation is before the court in this case.

2. COTERMINOUS OWNERS. *Smith* v. *Leavenworth*, distinguished.

The District Court also relied on *Smith* v. *Leavenworth*, 101 Miss. 238, 57 So. 803, (R.178), as being "determinative".

The decision in *Smith* v. *Leavenworth* was certainly correct on the physical facts there involved. There both parties were *laterally* adjoining riparian owners on *the same bank line* of the same stream from the time the accretions began to form until that suit began. But the case at bar is obviously different from *Smith* v. *Leavenworth* because here the area in controversy *never reached, or became attached to, Petitioners' shore line.* Here the wide Yazoo River was continually flowing as a live stream *between Petitioners' shore line and the area in controversy* until its mouth had progressed downstream beyond the lateral limits of Petitioners' lands on the opposite shore. Of course Respondent's accretion was never able to overtake, cross, or pass beyond, Petitioners' constantly retreating thalweg boundary. An accretion formation can never

jump over a deep flowing stream; or, as stated by the Circuit Court of Appeals: "Where a river is a boundary (like the Yazoo River here) * * * *a landowner can never cross the river to claim an accretion on the other side.*" (166 F. (2d) at 228-229).

Mr. Richardson (R.30-91) emphasized the fact that no part of the area in controversy was in fact, *or in law,* accretions to any part of Petitioners' land, and therefore none of the rules of law for apportioning accretions between *coterminous land owners* could possibly be applied to the area in controversy.

This is absolutely true. We challenge the Petitioners to cite a single, solitary decision, either in Mississippi or elsewhere, where one solid accretion area has been *apportioned* between land owners whose original lands lay on the opposite side of a large flowing stream like the Yazoo River. To the exact contrary, EVERY case dealing with the apportionment of accretion land is a controversy between *laterally adjoining, coterminous, abutting* land owners *whose lands lie* SIDE BY SIDE *on the* SAME BANK *of the same stream.*

We never heard of any theory of law to the contrary until it was amazingly advanced by Petitioners in the case at bar.

We submit that the Mississippi Courts have clearly recognized *this accretion fact.* In *Smith* v. *Leavenworth, supra,* now under discussion, as in every other case involving apportioning of alluvion, the accretion area was built out from the mainland of adjoining owners *on the same side of the river.* Therefore the court was following the universal rule now under discussion when, *under such circumstances,* it expressly held:

> "The fact that the alluvion began forming north of section 24 and opposite the land of appellant is immaterial. When it reached appellee's SHORE *line* in its southward progress, he became entitled to his portion thereof. *The general rule* for apportioning alluvion between COTERMINOUS *land owners* is to give each such proportion of the *new* SHORE LINE as they possessed of the former *shore* line before the formation of the alluvion."
>
> *Smith* v. *Leavenworth*, 101 Miss. 238, 57 So. 803.

This well known and settled rule of law was repeatedly conceded and asserted by Respondent, and often referred to by Mr. St. George Richardson in his testimony. An illustration of its applicability to the facts in the case at bar is found on Respondent's Exhibit 3. When the mouth of the former Yazoo River was finally closed and the area in controversy at its down stream tip *finally joined the mainland shore line*, thereafter on downstream from the final point of intersection of the two thalwegs there was a *continuous*, unbroken *shore line* beginning at the downstream end of the area in controversy and continuing along the mainland of Section 17 as the single unbroken left bank of the Mississippi River. Therefore any future accretions under these conditions must be apportioned between Respondent as owner of the area in controversy and his *coterminous neighbor*, the owner of Section 17 downstream. Mr. Richardson so testified (R.71). This solution harmonizes all decisions of all the courts anent the problem of apportionment of accretions.

3. *Wineman* v. *Withers*, distinguished.

The *reason* for the law under discussion also explains the correct holding of the Mississippi court in *Wineman* v. *Withers*, 143 Miss. 537, 108 So. 708 (R.177).

There the plaintiff temporarily lost a small portion of his original shore line by erosion, but shortly thereafter the river reversed its lateral movement and completely restored the original shore line. Of course *the riparian proprietor never lost title to that small portion of his shore line which was temporarily submerged* under the water because *the submerged portion was still on his side of the thalweg.* Therefore the Mississippi Court properly held:

> "The center or thread of the stream in either event continues to be his water boundary, and he continues to own all of the land, either above or under the water, that lies between that (thalweg) boundary and the opposite upland boundary established by the calls of his deed." *Wineman* v. *Withers, supra.*

It is thus apparent that however land is formed on a bed of a river, *while title to the bed is still in the riparian proprietor,* it will be owned by him, whether the formation be as an island offshore or as accretion to his shore. The court exepressly so held:

> "The title to *that portion* of the alluvion *should not be determined by the law of accretion,* but by the law of submergence and reappearance of land." *Wineman* v. *Withers, supra.*

The insuperable factual obstacle confronting Petitioners here is that no part of the area in controversy ever at any time formed as an island on that part of the bed of the river *then* owned by Petitioners or their predecessors in title. No part of the area in controversy was ever an island formed between Petitioners' shore line and their bounding thalweg of the river. Nor did any part of the area in controversy ever begin at Petitioners' shore line and proceed therefrom toward the river thalweg which constantly receded before the progressing accretions. *No*

accretions to Petitioners' original land ever crossed the flowing channel of the Yazoo River, or its thalweg. The channel of the Yazoo River continually *stopped all accretions* to Petitioners' lands *dead at the middle of the channel thereof* (R.61-62), now represented by the thread of the stream shown on Respondent's Exhibit 3; which, as a matter of law, for the reasons stated in the authorities hereinbefore cited, *must now forever constitute the definite, fixed and permanent West boundary line* of Petitioners' lands here involved.

4. Other cases relied on by Petitioners.

Harrison v. *Reading,* 3 *Smedes & Marshall* 366, and *The Steamboat Magnolia* v. *Marshall,* 39 Miss. 109, followed by the Fifth Circuit Court of Appeals in *Cox* v. *Phillips,* 277 Fed. 414 (Petitioners' brief, p. 28).

The holdings of these early cases result in *nothing more or less than the announcement of the rule that insofar as Mississippi is concerned the riparian owner on a river, navigable in fact, but not in law, takes title to the thread of the stream as it may exist at any particular time.* This fact has never been disputed by anyone in the case at bar.

However, this rule is of course subject to the well settled qualification that such a river boundary is a varying, unstable, shifting one.

Moreover, we might quote from the *Harrison* v. *Reading* case where the court states:

> "It seems that the *common law rule* admits of no modification in consequence of the magnitude of a river."

This statement definitely rejects the contention of Petitioners that because the Mississippi River is larger than the Yazoo River the thalweg of the former should be considered, but the thalweg of the latter may be ignored. Respondent claims as its riparian rights to the Yazoo River as its Eastern boundary each and every riparian right which Petitioners argue for themselves with reference to their former Mississippi River Western boundary. Why not?

Nor do we find any solace for Petitioners in the case of *Iselin* v. *La Coste,* (C.C.A. 5th), 139 F. (2d) 887, which states:

> "• • • the main channel of the stream, in *whatever changed location it may be,* continues to be the boundary."

In that case the court was dealing only with the Mississippi River. Since we are here dealing with *both* the Mississippi and the Yazoo Rivers let us change the word "stream" in the last quotation from singular to plural, and the quoted pronouncement would still correctly read: *"The main channels of the two streams, in whatever changed location they may be, continue to be the boundary."*

Exactly so here, we submit. Exactly so held the Circuit Court of Appeals below.

5. *Paepcke, et al.,* v. *Kirkman, et al.,* 55 Fed. (2d) 814 (also a Fifth Circuit decision on Mississippi Law). We marvel that at page 57 of their brief Petitioners inadvertently quote from this case the legal fact that:

> *"The title to land formed by accretion is in the owner of the abutting* SHORE. *Archer* v. *Southern Ry. Co.,* 114 Miss. 403, 75 So. 251; *Richardson* v. *Simms,* 118 Miss. 728, 80 So. 4. Consequently, the

title to the land here involved is in appellees, unless it has been divested by adverse possession."

That is precisely the position of Respondent here. Since the area in controversy was formed by accretion to "the abutting shore" of Section 2 owned by Respondent, and was never formed as an accretion to any shore owned by Petitioners, the title to the land so formed must be in Respondent as "the owner of the abutting shore". The Circuit Court of Appeals correctly and unanimously so held. Why then should certiorari be granted?

CONCLUSION

The premises considered, and relying upon the authorities cited in each of the five Points of this brief, we respectfully submit that the Petitioners here seek to accomplish a legal impossibility. No part of the area in controversy was ever formed as an island on any part of the bed of any river then owned by the Petitioners or their predecessors in title. No part of the area in controversy was ever formed as an addition to the bank or shore line of any land ever owned by the Petitioners of their predecessors in title. Petitioners seek to claim an accretion area which was formed to Respondent's abutting land on the opposite side of a large, deep flowing, navigable-in-fact stream which separated Petitioners' land from the area in controversy, viz., the Yazoo River which Petitioners seek to forget but of which this Court takes judicial knowledge.

The obvious fallacies of Petitioners' contentions are so clearly pointed out in the unanswerable Opinion of

the Circuit Court of Appeals, Fifth Circuit, that we are confident the Petition for Certiorari will be denied.

Respectfully submitted

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This is to certify that copies of this brief have been served on opposing counsel on this the ____ day of July, 1948.